The Possibility of the Implementation of Fast-Track Legislation in Indonesia

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Abstract

The idea of the implementation of fast-track legislation in Indonesia has been widely discussed lately. It is triggered by the absence of definitive provisions regarding the period for the formation of law. This study examined concept and mechanism of fast-track legislation in some states; and compared them to Indonesia. It projected the idea of implementing fast-track legislation in Indonesia. The study used conceptual and comparative methods related to the mechanism of fast-track legislation. The analysis was performed qualitatively to produce conclusions related to the implementation of fast-track legislation in Indonesia. There are various methods of fast-track legislation around the world based on regulatory features, indicators, bill proposers, subjects, legalizations, and supervisions over the law generated from the fast-track legislation. Sometimes, law is generated quickly, and, on other occasions, it takes a long time, regardless of the material content, the urgency, and the implications. Indonesia needs clear benchmarks for law process completion. Unfortunately, the idea cannot be implemented immediately because a fast-track legislation mechanism must go together with an in-depth study, which covers several substantial changes in the Indonesian legal system in terms of law, institutions, and supporting instruments.

Keywords: constitutional court, fast-track legislation, formation of law.

A. Introduction

Based on the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution) and the Law Number 13 of 2022 on the Second Amendment to the

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Law Number 12 of 2011 on the Formulation of Legislation, the legislation process consists of five stages: planning, composition, discussion, legalization, and promulgation.[1] The 1945 Constitution and the Law on the Formulation of Legislation do not regulate it clearly. In short, a legislation process is deemed appropriate if the law formulators have passed the five stages above, regardless of the time. Consequently, many law formulations take a long time or, otherwise, only a short time without specific criteria, benchmarks, or urgency.

From late 2019 to the present, some laws have been legalized and are in effect. For example, the Law Number 19 of 2019 on the Second Amendment to the Law Number 30 of 2002 on the Criminal Corruption Eradication Commission; the Law Number 3 of 2020 on Amendment to the Law Number 4 of 2009 on Mineral and Coal Mining; the Law Number 7 of 2020 on Third Amendment to the Law Number 4 of 2003 on Constitutional Court; the Law Number 11 of 2020 on Job Creation; the Law Number 3 of 2022 on the Capital of the State; and the Law on the Formulation of Legislation. Interestingly, some of the laws were passed in a very short time. Some of them were even passed within days. Some of the laws were filed for judicial review to the Constitutional Court immediately following their enactment, both formally and materially, due to the short formulation process, lack of urgency, minimum accountability, accessibility, and public participation.[2]

The fast-track legislation mechanism is not a new phenomenon. Nonetheless, its implementation should be accompanied by apparent and strict rules, given that law is quite vital in a state. In this context, in case of no clear rule, there is only legislation's tyrannical patterns,[3] which may influence the course of a state on a bigger scale. Indonesia has not set up a specific regulation on fast-track legislation. However, Indonesia looks has followed some of the principles. Currently, the fast-track mechanism in Indonesia is only limited to the Government regulation in Lieu of Law's formulation by President[4] and the law formulation through Open Cumulative Register (DKT –*Daftar Kumulatif Terbuka*).[5] There are no specific regulation and procedure to explain whether Indonesia use fast-track legislation. To discuss the matter, the concept and mechanism of fast-track legislation is not something new in the dynamics of the state administrative system. It is even recorded that some states of the world have implemented it under certain conditions and procedures. Due to the fast process, the implementation of fast-track legislation mechanism can be limited to formulation of law on specific

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1 Article 20 of the 1945 Constitution after amendment and Article 1 point 1 LAW P3.

2 Wicipto Setiadi (et.al.), "The Role of Indonesia Constitutional Court Decision in the Process of Establishing the Law: A Case Study in the Process of Establishing the Law on General Elections," *Journal of Legal, Ethical and Regulatory Issues* 24, no. 1 (2021): 1-9.

3 Nathaniel J. Boyd, "Tyranny and Ethical Life in Hegel's Political Thought: The Tyrant-Legislator and Constituent Power," *Ethics & Politics* 23, no. 1 (2021): 145-162, https://doi: 10.13137/1825-5167/32025.

4 Article 22 of the 1945 Constitution After Amendment.

5 Article 23 paragraph (1) of the Law on Establishment of Legislation.

subjects with certain justifications. Therefore, further discussion on the idea of implementing fast-track legislation in Indonesia is essential. Moreover, fast-track legislation is still not discussed much in Indonesia.

To understand the concept of fast-track legislation, the early analysis in this paper was conducted by comparing various countries that had successfully implemented fast-track legislation, including the UK,[6] the US,[7] New Zealand,[8] and Ecuador.[9] In addition, some states have also succeeded in establishing strict and limited criteria, procedures, and requirements of fast-track legislation. Thus, there are clear limits and measurements on types of laws to be processed quickly. In principle, not all legislation can be processed with a fast-track legislation mechanism. It continued to the analysis of the idea of fast-track legislation implementation, which will answer whether Indonesia can implement fast-track legislation in its legislative process. There are previous studies on fast-track legislation, which may serve as a reference for or comparison of this paper. The studies include Chandranegara[10] and Aryanto[11] about the early idea of fast-track legislation mechanism implementation in Indonesia. This study is different from the two since it tried to discuss and analyze the possible implementation of fast-track legislation in Indonesia. It is related to regulatory aspects, authority, procedure, subject, public participation, supervision, and benefit. Therefore, this paper discusses two points. First, how are the concept and mechanism of fast-track legislation in various countries and their comparison with those in Indonesia? Second, how is the analysis of the idea of implementing fast-track legislation in Indonesia?

B. Concepts & Mechanisms of Fast-Track Legislation in Some States and Their Comparison to Indonesian

In a broad outline, a state condition can be divided into normal and emergency conditions. If a state is in a normal condition, the law is certainly common constitutional law. Vice versa, if a state is in emergency, the law is emergency constitutional law.[12] If a state is in a normal condition, the legislation process shall be normal legislation. Vice versa, if a state is in an emergency, its legislation

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6 Lord Advocate, "Declarations of Incompatibility and the Fast-Track Legislative Procedure," *Statute Law Review* 20, no. 3 (1999): 210-217, https://doi.org/10.1093/slr/20.3.210.

7 Natalie R Minter, "Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights," *Syracuse J. Legis. & Pol'y* 1 (1995): 107.

8 McLeay (et.al.), "Urgent Legislation in the New Zealand House of Representatives and the Bypassing of Select Committee Scrutiny," *Policy Quarterly* 8, no. 2 (2012): 12-22.

9 Craig Van Grasstek, "Is the Fast Track Really Necessary," *Journal of World Trade* 31, no. 2 (1997): 97.

10 Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast Track Legislation dalam Pengusulan Rancangan Undang-Undang oleh Presiden," *Jurnal Penelitian Hukum de Jure* 21, no. 1 (2021): 123-140, http://dx.doi.org/10.30641/dejure.2021.V21.12-140.

11 Bayu Aryanto, Susi Dwi Harijanti, and Mei Susanto, "Menggagas Model Fast-Track Legislation dalam Sistem Pembentukan Undang-Undang," *Jurnal Rechtsvinding* 10, no. 2 (2011): 187-205.

12 Jimly Asshidiqqie, *Hukum Tata Negara Darurat* (Jakarta: Rajawali Pers, 2007), 16.

process shall be emergency legislation. In addition, there is also fast-track legislation that can be used when a state is in both standard and emergency, depending on each country's regulations and needs. Some states of the world have implemented fast-track legislation in their legislation systems. There are some terms used to explain fast-track legislation, such as[13] expedited legislation, majoritarian exception,[14] fast-track legislative procedures, fast-track bill,[15] rapid legislation, instant legislation, accelerated procedure, and motion urgency.[16] States like the UK, New Zealand, Ecuador, and the US are examples that successfully implement fast-track legislation.

1. United Kingdom (UK)

In the UK, regulation on fast-track legislation or bills is set forth in the House of Lords' parliamentary rules.[17] The arrangements of fast-track legislation are indeed fully regulated by the rules of the House of Lords. In fact, the House of Lords often being the proposer of the fast-track legislation draft.[18] The House of Commons plays the role of a predominant chamber in debating and questioning the designed fast-track bill. If the House of Commons feels that the material is not fit to be designed and discussed on a fast-track mechanism, the material will not pass as fast-track legislation.[19] The mechanism has been implemented from 1974 in response to certain conditions, such as enactment of: Terrorism Prevention (Temporary Provisions) Act 1974; Criminal Justice (Terrorism and Conspiracy) Act 1998; Anti-Terrorism, Crime and Security Act 2001; Prevention of Terrorism Act 2005; Dangerous Dogs Act 1991; Criminal Evidence (Witness Anonymity) Act 2008; Banking (Special Provisions) Act 2008.[20] The fast-track bill mechanism is also implemented for matters related to the Northern Ireland, such as enforcement of some Northern Ireland Acts from 1995 to 2009.[21]

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13 Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast-Track dalam Pengusulan Rancangan Undang-Undang oleh Presiden," 129.

14 Christopher M. Davis, *Expedited Procedures in the House: Variations Enacted into Law* (New York: Congressional Research Service, 2003), 1-14.

15 House of Lords Select Committee on the Constitution, "Fast-track Legislation: Constitutional Implications and Safeguards," last modified on July 7, 2009, https://publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/116.pdf.

16 New Zealand House, Standing Order 95A.

17 Simson Caird (et.al.), "The Constitutional Standards of the House of Lords Select Committee on the Constitution," last modified on January 2014, https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/159_0.pdf.

18 Richard Kelly, "Fast-track Legislation," last modified on March 25, 2020, https://researchbriefings.files.parliament.uk/documents/SN05256/SN05256.pdf.

19 Richard Kelly, "Fast-track Legislation"; See House of Lords Select Committee on the Constitution, "Fast-track Legislation".

20 House of Lords Select Committee on the Constitution, "Fast-track Legislation: Constitutional Implications and Safeguards."

21 House of Lords Select Committee on the Constitution.

In 2020, due to Corona Virus Disease-2019 pandemic, the UK also implemented Corona Virus Act 2020 through a fast-track mechanism.[22] This was based on the Decree that Corona Virus Disease-2019 was classified under emergency status/condition by the World Health Organization (WHO).[23] Based on the laws above, fast-track bills in the UK refer to disaster and emergency-related conditions. However, besides the two conditions above, the fast-track scenario in the UK can be justified for other conditions based on

a. process of peace and maintaining unity: Scotland, Wales, and Northern Ireland;
b. correcting errors in law;
c. responding to court order;
d. ensuring that law is effective in specific condition;
e. solving change in budget;
f. ensuring that UK keeps complying with its international commitment;
g. responding to public protest; and
h. matters related to dealing with terrorism.[24]

Based on the House of Lords' recommendation, a fast-track bill is implemented in the UK in consideration of at least five principles as follows: thorough supervision by parliament; maintaining legislation's quality; giving institutions or organizations affected by the legislation the opportunity to participate in legislation process; law formulation principle based on proportionality, justification and response in line with the issue without harming citizens' fundamental constitutional rights; and maintaining transparency.[25]

2. New Zealand

New Zealand has implemented fast-track legislation under the term motion urgency since 1903.[26] The motion urgency has been implemented for over one century. It has become part of New Zealand's parliamentary legislation process. By development, the Standing Orders Committee have gradually limited motion urgency mechanism.[27] In this case, the urgency motion procedures are not used to shorten the time for discussion or debate over a Bill, but to limit the debate in the

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22 House of Lords Delegated Powers and Regulatory Reform Committee, "Coronavirus Bill (etc), 9th Report (Session 2019-21)", last modified on March 23, 2020, https://committees.parliament.uk/publications/430/documents/1653/default/; House of Lords Constitution Committee, "Coronavirus Bill, 4th Report (Session 2019-21)", last modified on March 24, 2020, https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/44/4403.htm; Graeme Cowie, "Coronavirus Bill: Amended Time Limits and Post-Legislative Review", House of Commons Library, 25 March 2020, 1-4.

23 Victor Imanuel W. Nalle, "Kritik Terhadap Perppu di Masa Pandemi: Pembatasan Hak Tanpa Kedaruratan," *Jurnal Mimbar Hukum* 33, no. 1 (2021): 63-89, https://doi.org/10.22146/mh.v33i1.

24 House of Lords Select Committee on the Constitution, "Fast-track Legislation."

25 House of Lords Select Committee on the Constitution, "Fast-track Legislation."

26 Ariyanto (et.al.), "Menggagas Model Fast Track Legislation," 195.

27 Ariyanto.

discussion phase.[28] There are four indicators for why a Bill in New Zealand is under the motion urgency category: (1) to accelerate certain legalization of a particular law, with a specific reason; (2) to finish a series of legislations queue, (3) specific tactical reason, and (4) budget issue.[29]

3. United States (US)

The US calls the fast-track legislation mechanism the term fast-track or expedited legislation. US's expedited legislation mechanism regulation is under the rule issued by the parliament, the House of Rules and Manual, specifically under Statutory Legislative Procedures section.[30] In addition, some of the expedited legislation provisions also appear in the Senate Manual.[31] The existence of expedited legislation is influenced by the concern that the existing legislation process takes a long time, even years, usually due to a lack of political support from the House of Representatives and Senate chambers. Thus, in case of a certain situation, a Bill or resolution under formulation in response to particular situation has never reached any approval or rejection at the Legislature level.

Therefore, expedited legislation is intended to enhance the probability for one of the both legislature chambers to vote at designated time.[32] In this case, it is necessary to note that the main objective of expedited legislation is not to make a bill or resolution a law, but to push the House of Representative and the Senate to vote more quickly to decide whether the relevant bill or resolution can become a law.[33] With regard to the subject of expedited legislation, US does not use certain benchmark, since any use of this mechanism completely under the House of Representative or Senate's consideration, individually or collectively.

4. Ecuador

While the countries like The UK, New Zealand, and US regulate their fast-track mechanism in a parliamentary rule, Ecuador puts its fast-track legislation mechanism as a constitutional content, as observable in its provisions in Article 140 of Ecuador's Constitution. Basically, the article authorizes president to deliver a bill to the National Assembly (Ecuador's National Assembly/parliament) to deal with emergency in economic issue. Having the bill delivered, the parliament is required to respond within thirty (30) days, either: approval, modification, or rejection of the bill. As a note, if the bill delivered by President is under discussion, President

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28 Ariyanto.

29 Ariyanto.

30 Christopher M. Davis, "Expedited or Fast Track Legislative Procedures," *Congressional Research Service,* (Augustus, 2015), 1.

31 Stanley Bach, "Fast Track or Expedited Procedures: Their Purpose, Elements and Implications*", Congressional Research Service,* (January 2001), 2.

32 Christopher M. Davis, "Expedited Procedures in the House: Variations Enacted into Law", *Congressional Research Service*, (September 2015), 1.

33 Stanley Bach, "Fast Track or Expedited Procedures," 3.

cannot deliver any other bill, except there has been a prior state of exception. Later, if within the 30 days the parliament does not give any response, President shall have the right to stipulate it as a law as a decree law, and to instruct to issue an Official Register. In this case, the parliament can at any time modify or revoke the decree based on a predetermined regular process by the Constitution.[34]

5. Indonesia

Indonesia has not regulated fast-track legislation yet. However, there are some mechanisms that are almost similar with fast-track legislation, such as the formulations of the government regulation in lieu of law and the law formulation by DKT. Article 22 of the 1945 Constitution mentions about the government regulation in lieu of law.[35]

In addition to Article 22 of the 1945 Constitution, the Constitutional Court also provides several criteria of *exigencies compel* through the Decree Number 138/PUU-VII/2009 that must be met either one or all of them, before the President can issue the government regulation in lieu of law. First, there is an urgent need to resolve legal issues quickly based on the law. Second the required law does not exist so there is a legal vacuum; or there is a law that is insufficient. Third, the legal vacuum cannot be addressed by way of making a law by the ordinary procedure because it will take a considerable amount of time whereas such urgent circumstances need certainty to be resolved.[36]

The DKT is a path of legislation. Based on the existing rules, Indonesia's legislation process recognizes three paths: (1) National Legislation Program (Prolegnas –*Program Legislasi Nasional*); (2) Open Cumulative Register (DKT – *Daftar Kumulatif Terbuka*); and Non-Prolegnas.[37] The DKT is contained in Article 23 paragraph (1) the Law on the Formulation of Legislation. Prolegnas contains open cumulative register consisting of:

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[34] Article 140 of Ecuador's Constitution states: "*The President of the Republic will be able to send to the National Assembly bills qualified as urgent on economic matters. The Assembly must adopt, amend, or turn them down within thirty (30) days at the most as of their reception. Procedures for submittal, discussion and adoption of these bills shall be the regular ones, except with respect to the previously established time limits. While a bill qualified as urgent is being discussed, the President of the Republic will not be able to send another, unless a State of Exception has been decreed. When the Assembly does not adopt, amend, or turn down the bill qualified as urgent in economic matters within the stipulated time limits, the President of the Republic shall enact it as a decree- law or shall order its publication in the Official Register. The National Assembly shall be able, at any time, to amend or repeal it, on the basis of the regular process provided for by the Constitution.",* Ecuador's Constitution of 2008 accessed from: https://www.constituteproject.org/constitution/Ecuador_2008.pdf.

[35] Article 22 of the 1945 Constitution after amendment, that:
1) Should exigencies compel, the President shall have the right to establish government regulations in lieu of laws.
2) Such government regulations must obtain the approval of the House of Representatives during its next session.
3) Should there be no such approval, these government regulations shall be revoked.

[36] Constitutional Court Decree Number 138/PUU-VII/2009, 19.

[37] Zainal Arifin Mochtar, *Politik Hukum Pembentukan Undang-Undang* (Yogyakarta: EA Books, 2022), 94.

a. legalization of certain international treaty;
b. consequences of constitutional court's decision;
c. state budget;
d. *formation, division, and integration of provincial and/or regency/city region; and stipulation/cancellation of government regulation in lieu of law.*

In the review of the government regulation in lieu of law and DKT mechanisms, the two are identical to fast-track legislation, but only from the period fastness aspect. It is incorrect to say DKT and the government regulation in lieu of law is a fast-track legislation since the path is intended to quicken a bill to enter *Program Legislasi Nasional* (Prolegnas) instead of to accelerate its formulation. On the other hand, government regulation in lieu of law cannot be considered fast-track legislation. Indeed, government regulation in lieu of law can be created fast. Still, it is not qualified as fast-track legislation since *first*, it is a product of the President as the executive, which is usually immediately coordinated by the State Secretariat; and *second*, the government regulation in lieu of law still requires the House of Representatives (DPR –*Dewan Perwakilan Rakyat*) objective approval in the next session, to be canceled or applied as a law.[38]

Besides The government regulation in lieu of law and DKT, in the Law on the Formulation of Legislation, there is a provision that can be referred to in formulating a law through fast-track.[39] This can be observed in the provisions of Article 23 Paragraph (2) the Law on the Formulation of Legislation, that:
In certain condition, the DPR or President can submit a Bill outside Prolegnas covering:
a. Dealing with extraordinary condition, conflict condition, or natural disaster; and
b. Other certain condition that ensures national urgency for a Bill that can be collectively agreed upon by the DPR's instrument that specifically deals with legislation and minister that administers governmental affairs in the field of law.

Based on the provisions, we can conclude that even if a bill has entered the list of priority in Prolegnas, but it is still not absolute. In case of condition or necessity arising as mentioned in the provisions above, a new bill can be filed into Prolegnas's official list of bills of priority.[40] Although the provisions of Article 23 Paragraph (2) the Law on the Formulation of Legislation can be referred as a basic base for fast-track legislation in Indonesia, a more specific regulation in the positive

[38] Wicipto Setiadi, "Fast-Track Legislation sebagai Bentuk Peningkatan Supremasi Hukum," material delivered in open discussion of Faculty of Law, Universitas Padjajaran, on 17 December 2020.
[39] Wicipto Setiadi.
[40] Jimly Asshiddiqie, *Perihal Undang-Undang* (Jakarta: Rajawali Press, 2020), 185.

law is still needed. This is undoubtedly a form of improvement of legal supremacy and legal certainty.[41]

C. Analysis of the Idea of Implementing Fast-track Legislation in Indonesia

As a notion, the idea of implementing fast-track legislation in Indonesia is fascinating, mainly if reviewing the development of Indonesia's current constitution. There are some things to discuss and analyze in the idea of implementing fast-track legislation, including any challenges to the implementation. The things to discuss in fast-track legislation implementation in Indonesia are the regulatory aspect, the authority, subjects, procedures, public participation, supervision of the law implementation, benefits of fast-track legislation mechanism, and risks of fast-track legislation implementation.

1. Regulatory Aspect

Based on the comparison with some countries in the explanation above, it is noted that regulation of fast-track legislation can be set at constitutional, law, or agency rule levels. We can then imagine that regulation o fast-track legislation in Indonesia can also be set forth in the 1945 Constitution,[42] or the Law on the Formulation of Legislation, or even in law formulating agency. However, in the author's opinion, comparing the regulations of fast-track legislation in some countries, it would be better to set specific regulations of fast-track legislation in the Law on the Formulation of Legislation. In this context, the author has two scenarios: using Article 23 paragraph (2) of the Law on the Formulation of Legislation as the basis for fast-track with notes: that the provisions of Article 23 paragraph (2) must be changed first, or indeed regulated in a new and specific way through a separate article in the Law on the Formulation of Legislation.

a. Authority to Propose a Bill

Regarding whom is authorized to file or propose a Bill with a fast-track mechanism, we should understand first that the authority to formulate law is at the hand of the DPR,[43] since traditionally, however, law making or legislation process is the main function of legislative body or the parliament.[44] Automatically, the DPR as the main legislator is authorized to file a Bill. Besides the DPR, it is defined in the 1945 Constitution after amendment that President[45] and Regional Representative Council (DPD –*Dewan Perwakilan Daerah*)[46] also have the right to file a Bill.

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41 Wicipto Setiadi, "Fast-Track Legislation."

42 Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast-Track," 136.

43 Article 20 of the 1945 Constitution After Amendment.

44 F.A Hayek, *Law Legislation and Liberty* (Great Britain: Routledge, 1998), 124.

45 Article 5 paragraph (1) of the 1945 Constitution After Amendment.

46 Article 22D of the 1945 Constitution After Amendment. It is stated that DPD can propose a Bill as long as the bill is related to regional autonomy, relationship between central and regional governments, formation, separation and integration of a region, management of natural resources and other economic resources, and

Therefore, the three institutions mutually have the right to file a Bill, which will be formulated through a fast-track mechanism.

However, it should be noted that practically, it is a fact that most of the Bills are from the Government.[47] Basically, this tendency is caused by the government's position as the executor of law. Compared to the parliament, the government has the most information on what, when, and why something must be regulated through law.[48] This is also related to the resources, funding, and experts the government is in possession of.[49] In this case, it is actually very relevant for us to place the President (government) as the sole proposer of the Bill to be included in the fast-track mechanism, *as stated by* Chandranegara.[50] However, regardless of who proposes Bill's substance, debates and discussions are the main focus here.[51] To put it simply, the choice of who proposes is just a rational choice.[52] The proposer can be from legislative or executive environments.

b. Subject

In regular legislation, talking about a subject is a complex discussion.[53] In a real sense, what can be regulated and included as a material of law? According to Soeprapto, generally, a "material of law" cannot be determined for its material scope. Thus, all materials can be a subject of law.[54] However, according to Attamimi, the "subject of law" is an essential thing to research and find.[55] Accuracy is needed to sort which "affairs" should be regulated through the law level or below the law level.[56] This is because the subject also contributes to debate, discussion, and the extent public participation is needed.

While normal legislation ideally requires accuracy and precaution in selecting subject, the same attitude – even an extra one is also needed in selecting subject for a Bill with a fast-track legislation mechanism. As an initial point, we can use the fast-track bill criteria in UK or if we choose to use the existing legal basis, we can also apply the provisions of Article 23 paragraph (2) letter the Law on the

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financial balancing between central and regional governments, and with regard to financial balance between related central and regional governments.

47 Jimly Asshiddiqie, *Perihal Undang-Undang,* 199. Jimly Asshiddiqie, *Pergumulan Peran Pemerintah dan Parlemen dalam Sejarah: Telaah Perbandingan Konstitusi Berbagai Negara* (Jakarta: UI Press, 1996), 180.

48 Jimly Asshiddiqie.

49 Jimly Asshiddiqie*,* 199-200.

50 Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast-Track*,"* 136.

51 Jimly Asshiddiqie, *Perihal Undang-Undang*, 200.

52 Jimly Asshiddiqie*,* 201.

53 See provisions of Article 10 paragraph (1) LAW P3, subject that must be regulated with law contains: *Further regulation of the provisions of the 1945 Constitution of the Republic of Indonesia; Instruction that a Law is to be regulated with a Law; legalization of certain international treaty; Follow-up of Constitutional Court's decree; and/or fulfillment of the people's legal needs.*

54 Maria Farida Indrati Soeprapto, *Ilmu Perundang-Undangan 1: Jenis, Fungsi, dan Materi Muatan* (Yogyakarta: Kanisius, 2020), 368.

55 Maria Farida Indrati Soeprapto.

56 Zainal Arifin Mochtar, *Politik Hukum Pembentukan,* 235.

Formulation of Legislation as one of the subjects of fast-track Bill, that is an *extraordinary condition, conflict condition, or natural disaster.* In addition, government regulation in lieu of law's construction of the subject, such as *should exigencies compel, vacancy of law, and urgent necessity,* can also be used. However, given the people's dynamic needs and conditions, the subject of the fast-track Bill can also be beyond those mentioned above. Ideally, in the early stage of proposing a Bill, there should be an explanation from the proposer concerning why the Bill must be made and why it should be legalized using a fast-track legislation mechanism. Moreover, the subject of the Bill to be completed through a fast-track mechanism should also consider citizens' human rights.

c. Procedure

The fast-track mechanism is undoubtedly not intended to reduce the stages of the legislation process. It is to shorten the stage time. As presented above, the legislation stage in Indonesia includes planning; composition; discussion; legalization, and promulgation. Among the five stages above, the most challenging stage usually takes time is the discussion stage. As a crucial stage,[57] discussion stage ideally makes the public role intensive, allowing the debate's substantive quality that assures the quality of the substance of the final formulated result of the relevant law.[58] In this case, we can use the procedure in New Zealand to limit the debate in the discussion stage, which can at least shorten the time. Thus, the concerned Bill can proceed to the next stage. In addition, the period for fast-track legislation should ideally be not more than thirty (30) days.

d. Public Participation

In Indonesia, the discussion of public participation was a hot topic after the issuance of Constitutional Court Decision Number 91/PUU-XVII/2020 in the formal review of the Job Creation Law. Constitutional Court later required three (3) components of public participation (meaningful participation) in law formulation: the right to be heard, the right to be considered, and the right to be explained.[59] Meaningful participation must be performed, at least, in the stages (i) filing of a bill; (ii) discussion between the House of Representatives (the DPR) and President, and discussion between the DPR, President, and DPD to the extent related to Article 22D paragraph (1) and paragraph (2) of the 1945 Constitution; and (iii) mutual approval between the DPR and President.[60] This decree was later followed up by the DPR with second amendment to the Law on the Formulation of Legislation.[61]

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57 Jimly Asshiddiqie, *Perihal Undang-Undang,* 200.

58 Jimly Asshiddiqie.

59 Constitutional Court, Decree Number 91/PUU-XVII/2020, 393.

60 Constitutional Court.

61 Article 96, that:
1) The people have the right to give oral and/or written input in each stage of Formulation of Legislation.
2) People' input as referred to in paragraph (1) shall be given online and/or offline.

On this point, it is apparent that what is written in the Law on the Formulation of Legislation is far different from Constitutional Court Decision Number 91/PUU-XVII/2020. In the Law on the Formulation of Legislation, the law formulators even reduce the people's rights of meaningful participation and tend to put the meaningful participation room as the rights of law formulators, and as an obligation. As one of the fundamental principles in legislation process,[62] participatory principle is placed as guarantee of rights for minority to participate and express their view. This is because decision making is usually performed by the majority in which in this process there will certainly be potential violation of the minority's rights. Therefore, in participatory principle, minority has the right to express their view and convince others of their view, so that it can at least influence majority's decision.[63] This is certainly related to democracy. Tornquist states that universally, the objective of democracy is "citizen control" over public affairs based on political equality.[64]

Regarding participation in policy making, Arnstein states that there are eight (8) steps of participation, namely: manipulation; therapy; informing; consultation; placation; partnership; delegated power; and citizen control. The 8 steps are divided by Arnstein into three levels of participation, with non-participation (manipulation, therapy) as the lowest group; tokenism (informing, consultation, placation) as the middle group and citizen power (partnership, delegated power, citizen control) as the highest group.[65] Comparing the opinions of Tornquist and Arnstein, we can find that a policy formulation is "democratic" if it has entered citizen control stage. Otherwise, using Arnstein's thinking framework to analyze Article 96 Law on Establishment of legislation, the concept of public participation in Law on Establishment of legislation tends to be of the tokenism area. Tokenism means a condition where there is participation, but there is a significant

3) People as referred to in Paragraph (1) are natural person or group that is directly affected and/or has interest in the materi muatan Draft Legislation.

4) For the people's ease of giving input as referred to in paragraph (1), each Academic Script and/or Draft Legislation can be easily accessed by the people.

5) In implementing the right as referred to in Paragraph (1), Legislation formulator shall inform the people of Formulation of Legislation.

6) To fulfill the right as referred to in Paragraph (1), Legislation formulator may perform public consultancy activities through public hearing meeting, work visit, seminar or workshop, discussion, and/or other public consultancy activities

7) The result of public consultancy activities as referred to in paragraph (6) shall be the material to be taken into consideration in planning, composition, and discussion on Draft Legislation.

8) Legislation formulator may explain to the people the result of discussion on public input as referred to in Paragraph (1).

62 Suzie Navot, "Judicial Review of the Legislative Process," *Israel Law Review* 39, no. 2 (2006): 219, https://doi.org/10.1017/S0021223700013066.

63 Suzie Navot.

64 Olle Tornquist, *Introduction: The Problem is Representation! Towards and Analytical Framework* (New York: Palgrave Macmillan, 2009), 1-24.

65 Sherry R. Arnstein, "A Ladder of Citizen Participation" *AIP Journal* (1969): 217, https://doi.org/10.1080/01944366908977225.

constraint/it is significantly inhibited; thus, the participation is less pursuant to what it should be,[66] especially in the context of meaningful participation.

The indication of informing can be found in the provisions of Article 96 paragraph (1) through paragraph (5) showing an information that the people have the rights, responsibility, and choices to step into participation.[67] Meanwhile, the indication of consultation and placation can be found in the provisions of paragraph (6) through paragraph (8). Consultation is another advanced form of the informing step. Consultation occurs when there is "invitation" to the people to give their opinion towards full participation.[68] However – as Arnstein said, if consultation is not combined with the other forms of participation, this step is still fake since it does not guarantee the people's concern and idea will be taken into account.[69] Arnstein also states that the most often used method for consultation is attitude survey, environmental meeting, and public hearing.[70] The next is placation, where the people in certain degree start to be aware that they do not have any influence in policy making. Policy making is finally understood by the people as a very limited authority.[71]

Logically, the provisions of Article 96 the Law on the Formulation of Legislation are used for normal legislation process. Here, however, we also understand that the concept of participation in Article 96 is also not ideal year to achieve a concept of meaningful participation in normal legislation, as constructed by MK. Therefore, to place the concept of public participation as that in the provisions of Article 96 the Law on the Formulation of Legislation into the fast-track legislation mechanism is difficult and poses new challenge. The public participation issue raises a new question: is public participation needed in fast-track bill legislation? Of course! The answer can be elaborated from the characteristics of law itself. The main characteristic of law is that it binds the people entirely without exception and not limited to certain institution, organization, or community. Thus, regardless of the subject of bill and its making mechanism, public participation is clearly needed.

We can follow the public participation in UK's fast-track mechanism, where the House of Lords as one of the parliamentary chambers actively emphasize public participation amidst fast-track bill process. IItis apparent here that the bicameral parliamentary chamber design as followed in UK can increase public participation. Indonesia actually has two chambers or two representative bodies, the DPR and the DPD.[72] However, up to the present, there are still debates over the

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66 Sherry R. Arnstein.
67 Sherry R. Arnstein, 219.
68 Sherry R. Arnstein.
69 Sherry R. Arnstein.
70 Sherry R. Arnstein.
71 Sherry R. Arnstein, 220.
72 Imran (et.al.), "Legal Standing and Authority of the Regional Representative Council in the Indonesia Constitusional System," *Amsir Law Journal* 1, no. 2 (2020): 54-60, 10.36746/alj.v1i2.23.

parliamentary chamber system in Indonesia.[73] Some say Indonesia follow unicameral system.[74] The others say that it is bicameral system.[75] Some others even say that it is tricameral system.[76]

It is difficult to classify which chamber system in Indonesia, since the 1945 Constitution after amendment also does not state it explicitly.[77] Further traced, the DPD issue started from discussion on People's Consultative Assembly (MPR – *Majelis Permusyawaratan Rakyat*) during the discussion of amendment to the 1945 Constitution, in which the discussion resulted in two groups, reformist and conservative. The reformist group desired change in MPR's function like that of the US Congress, while the conservative group desired to maintain MPR as it was.[78] It should be noted that the main intention of the idea of DPD besides the DPR (in plain view as a two-chamber system) was to balance the DPR's power.[79] Despite the idea, the norming and implementation stages were not as they should be. DPD's current authority seems disproportionately formulated.[80] The implication is that the existing bicameral system in Indonesia as followed in the 1945 Constitution after amendment does not conform to the general bicameral principle in the constitutional theory.[81]

The existence of DPD besides the DPR is also something uncommon in a constitutional system and cannot be called bicameralism in the common sense.[82] In fact, it is a combination of quite weak authority and high legitimacy.[83] In the legislation process, for example, comparing between the authority of the DPR and of DPD, DPD's authority is quite weak and even almost meaningless. Because, DPD's highest authority in the legislation process is to file and participate in discussing bill related to regional autonomy, relationship between central and regional governments, formation, separation and integration of a region, management of natural resources and other economic resources, and financial balancing between central and regional governments, and with regard to financial balance between central and regional governments.[84] Simply put, in the whole of

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73 Zainal Arifin Mochtar, *Politik Hukum Pembentukan Undang-Undang,* 131.

74 Valina Singka Subekti, "Keterwakilan dan Tipe Parlemen", *Makalah Seminar Pengkajian Hukum Nasional (BPHN),* Komisi Hukum Nasional, Jakarta, presented at 25-26 August 2008, 5.

75 Dahlan Thaib, "Menuju Parlemen Bikameral (Studi Konstitusional Perubahan Ketiga UUD 1945), *Pidato Pengukuhan Jabatan Guru Besar Ilmu Hukum Universitas Islam Indonesia,* Yogyakarta, 8.

76 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Mahkamah Konstitusi RI dan Pusat Studi HTN FH UI, 2004), 274.

77 Moh. Mahfud MD, *Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi* (Jakarta: Rajawali Press, 2010), 69-70.

78 Moh. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu* (Jakarta: Rajawali Press, 2012), 168-167.

79 Zainal Arifin Mochtar, *Politik Hukum Pembentukan Undang-Undang,* 135.

80 Sherry R. Arnstein, "A Ladder of Citizen Participation," 217.

81 Zainal Arifin Mochtar & Saldi Isra, *Parlemen Dua Kamar: Analisis Perbandingan Menuju Sistem Bikameral Efektif* (Yogyakarta: Genta Publishing, 2018)*,* 136.

82 Ni'Matul Huda, *Hukum Tata Negara Indonesia* (Jakarta: PT. RajaGrafindo Persada, 2016), 190.

83 Stephen Sherlock, "Indonesia's Regional Representative Assembly: Democracy, Representation and the Regions", *Centre for Democratic Institutions,* July 2005, 9.

84 Article 22D of the 1945 Constitution After Amendment.

the legislative process – there is no power that can balance the power of the DPR, which is relatively centralized. This is, of course, a problem in the legislative process because it opens potency for misuse of the aims and intent of law instruments by the DPR at the main level without the possibility of ideal checks and balances from the DPD which is the regional representatives.

Until now, the design of the relationship between the DPR and DPD is still being discussed and even debated. If the DPR-DPD design is improved and adapted to the appropriate bicameral concept, it can improve public participation, not only in fast-track legislation but also in standard legislation mechanisms. If we refocus on how public participation is in the context of fast-track legislation by combining analysis of the concept of public participation in Article 96 of the Law on the Formulation of Legislation with the current condition of the legislation system at the parliament, public participation in fast-track legislation mechanism will undoubtedly face a big challenge. This is, in fact, still possible to deal with by improving the implementation of public participation and reforming Indonesia's parliamentary chamber system and design first.

e. Benefit

Imagining that fast-track legislation implementation has been regulated in Indonesia, there are at least some beneficial advantages that are worth to consider. First, legal sovereignty and legal certainty must be realized and improved. Second, there are clear criteria and process in legislation process. There must be clear criteria, measures, and urgency of a quick process. Therefore, there is no longer issue why a law is made quickly and why the other laws take time. Third, fast-track legislation can be used as an alternative of the government regulation in lieu of law, which may limit the number of the government regulation in lieu of laws.

In discussion on the government regulation in lieu of law, it should be noted that the initial ratio the legal product of the government regulation in lieu of law model is made is potential emergency.[85] Usually, emergency brings logical consequence in the form of stipulation of emergency status, and moreover – requires emergency legislation, which is left for the highest executive power, such as King, Queen, or President. The authority to stipulate an emergency condition and emergency legislation to executive power starts from the assumption that legislative power cannot formulate law fast to deal with relevant conditions,[86] since commonly law formulation at the parliament takes relatively long time, thus it is not effective for such a sudden condition.

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[85] Niccolo Machiavelli, *Discourse on Livy* (Chicago: University of Chicago Press, 1996), 74. For Niccolo Machiavelli, a state will never be declared perfect, unless that state has provided rules for anything. Through his thinking, Machiavelli gives suggestion to states to prepare legal provisions which are *ex-ante* that also regulate public authority implementation in emergency. This view is commonly used in modern constitutions related to state of emergency.

[86] John Locke, *Second Treatise on Government* (Early Modern Text, 2017), 53.

Conceptually, a legal product like government regulation in lieu of law has binding content and power like the law.[87] However, although the regulation takes immediate effect, it is effective temporarily since it requires parliament's approval to be enacted as a law or canceled.[88] Discussion on legislation like government regulation in lieu of law cannot be separated from the requirements for its issuance. In his description, Asshidiqie states that materially, the stipulation of a legal product like the government regulation in lieu of law must satisfy three requirements,[89] including Reasonable necessity (there is an urgent need to act); Limited time; Reasonable doubt (in the sense there is no other alternative or based on reasonable reasoning (beyond reasonable doubt) of other alternative expected to not to solve the condition). Having the requirements fulfilled, the President, with its power and constitutionally, can issue the government regulation in lieu of law.

Although the authority to issue the government regulation in lieu of law is commonly regulated constitutionally, the government regulation in lieu of law issuance has high risk. Due to this high risk, the existence of government regulation in lieu of law from time-to-time experiences various dynamics of regulation and limitation. The "risk" is from the government regulation in lieu of law's non-democratic characteristics since the executive unilaterally (subjective) issues it. Although by substance, it is a law, by ratio, it is unequal to a law made by a legislative institution. There are some risks of government regulation in lieu of law issuance in the context of an emergency. Some of the risks are presented by Posner and Vermeule. First, there is a situation where the executive can be in "panic" and make an act that limits freedom too much (panic theory). Second, there is potential that various measures taken by the executive even sacrifice the minority's rights and otherwise benefit the majority (democratic-failure theory). Third, there is a possibility that the executive may fail to return to normal legal order after the emergency subsides (ratchet theory).[90] In the same context, Jan Petrov also states that there will always be a possibility that the executive may misuse the power for power contestation for personal benefit.[91]

Based on this, we may understand that issuance of a legal product like the government regulation in lieu of law is often taken. However, the state is not under any emergency. The government regulation in lieu of law issuance in this context is usually associated with legal vacancy or relevant ruler's political will. In short, it is

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87 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): 5, http://dx.doi.org/10.21143/jhp.vol.48.no.1.1593.

88 Fitra Arsil.

89 Jimly Asshidiqqie, *Hukum Tata Negara Darurat* (Jakarta: Rajawali Pers, 2007), 282.

90 Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty and The Courts* (Great Britain: Oxford University Press, 2007), 12-14.

91 Jan Petrov, "The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?" *The Theory and Practice of Legislation* 8 (2020): 75, https://doi.org/10.1080/20508840.2020.1788232.

not derived from emergency but from subjective reasoning, which cannot be classified as usual. Analyzed further, not only does the government regulation in lieu of law in an emergency have a high risk, but the government regulation in lieu of law in a normal condition also has its own risk. For example, first,[92] certainly opens a path for the executive to misuse its authority that is not in line with the principle of power separation or checks and balances. Second, government regulation in lieu of law issuance is prone to generating complicated relations between executive and legislative.[93] Moreover, if the legislative assumes that such a measure is deemed a form of executive resistance against the legislative. The result will undoubtedly lead to the government's instability.

In this case, observing John Ferejohn and Pasquale Pasquino's opinions is interesting. They present a finding that countries with advanced democratic levels do not always use constitutional powers – in the sense of using legal products and government regulation in lieu of law to deal with emergency conditions. Instead, countries with advanced democracies prefer dealing with such conditions using common law, even if their constitution regulates the constitutional powers above.[94] In short, they use the legislative rather than the executive model.[95] The legislative model discussed by Ferejohn and Pasquino leads to the practice in the UK and the US, which prefer using two types of alternative scenarios: first, maximizing the use of the existing law; second, parliament performs legislation process that uses fast-track legislation mechanism.[96] Ferejohn and Pasquino also explain that the option to use the legislative model in an emergency is caused by some possibilities, namely: first, the concerned emergency does not contain sufficiently big emergency in order to use emergency implementation; second, there is the high precaution of the government in considering the use of the enormous constitutional power to deal with an emergency.[97] Lastly, based on many historical records, there is a concern that using such extraordinary power will lead to power abuse.[98]

For such various risks, issuance of a legal product like the government regulation in lieu of law should not be taken as something familiar but as the last option when there is no longer another way to take it. In adaptation to the Indonesian condition, the President can take the government regulation in lieu of

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92 More Jeremy Waldron, "Separation of Powers in Thought and Practice," *Boston College Law Review* 54, no. 2 (2013): 433-468.

93 Read about divided government in Scott Mainwaring's research, "Presidentialism, Multipartism, and Democracy: The Difficult Combination," *Journal of Comparative Political Studies* 26, no. 2 (1993); Scott Mainwaring, "Presidentialism in Latin America," *Latin American Research Review* 25, no. 1 (1990): 157-179.

94 John Ferejohn & Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers", *International Journal of Constitutional Law* 2, no. 2 (2004): 215, https://doi.org/10.1093/icon/2.2.210, 210-239.

95 John Ferejohn & Pasquale Pasquino,

96 John Ferejohn & Pasquale Pasquino.

97 John Ferejohn & Pasquale Pasquino, 215-216.

98 John Ferejohn & Pasquale Pasquino, 216.

law, given that the DPR is in recess or not in session at the time. As long as the DPR is still in session, the alternative to consider replacing the government regulation in lieu of law is using fast-track legislation.

f. Implementation Risk

As discussed above, the law born from the fast-track mechanism contains at least some risks: first, potentially minimum public participation; second, lack of study and research due to time constraints, which will have other implications in the form of non-matured discussion and debate stages, leading to an impression of rubber stamp; third, the practice of fast-track legislation will be prone to be made use of some interest which may lead to regulatory capture or state capture; fourth, potentially minimum supervision; and lastly, there will be the proposal for formulating bill of non-urgent matters, using fast-track legislation mechanism.[99] These risks are certainly experienced by countries that have successfully implemented fast-track legislation in their legislation process. The inquiry of quality will always be the central issue in the fast-track legislation mechanism. Therefore, precaution is needed in law formulation in determining and discussing the type and subject of the bill to be completed using a fast-track legislation mechanism since, principally, not all laws can be completed using a fast mechanism.

D. Conclusion

Based on the discussion, this study concludes some points. There are various methods of fast-track legislation around the world based on regulatory features, indicators, bill proposers, subjects, legalizations, and supervisions over the law generated from the fast-track legislation. The fast-track legislation refers to the "special procedure" of fast formulation of law without compromising study or public participation in the process. Minimum study and public participation is not allowed due to the characteristics of the prevailing laws without exception. Therefore, based on the comparison of some states, the fast-track mechanism implementation is limited to a particular subject and justification. It means that the fast-track mechanism cannot cover all laws. If the idea of fast-track legislation is to be implemented in Indonesia, some regulatory aspects must be discussed. For instance, the aspects are the authorized parties who can propose a bill with a fast-track mechanism; subjects that can use fast-track legislation; the required procedures and time; public participation; supervision over the implementation of the law; advantages of fast-track legislation mechanism implementation; and risks of fast-track legislation implementation.

Therefore, the idea of implementing fast-track legislation in Indonesia is actually feasible. However, based on the analysis, some challenges or risks need to be settled first. Thus, the idea of implementing a fast-track legislation mechanism

[99] Ibnu Sina Chandranegara, "Pengadopsian Mekanisme Fast-Track," 133-134.

in Indonesia still needs time and further study. The fast-track legislation mechanism cannot be implemented immediately. There should be an ideal medium and resources. In support of fast-track legislation implementation, there should be some substantial changes in the Indonesian legal system.

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