

Constitutionality in Draft of Omnibus Law in Pancasila Perspective

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Info Artikel	Abstract
<p>Received: 26/06/2020 Revised: 06/07/2020 Accepted: 25/08/2020</p> <p>Keywords: Omnibus Law, Presidential decree</p>	<p>President Jokowi, in his second leadership, has two major programs. The first is to maintain Pancasila state and to accelerate national development. His second program concerns simplification of domestic regulation that relates with economy through Omnibus Law as a reaction to global economic power shift.</p> <p>The problem is whether the implementation of the Indonesia state legal system can accept Omnibus Law model or not when it is viewed from constitutional perspective or from legislation hierarchy in Indonesia (taking into account constitutional requirements, meaning that it is not contradictive with the 1945 constitution).</p> <p>In the preamble of Omnibus Law draft, article 5 and article 20 the 1945 constitution are mentioned. As formal requirements, both articles provide enough space. It is mentioned in article 5 paragraph 1 that President has the right to propose a law. Furthermore, in article 20 paragraph 2 and 3, it is stated that all bill drafts have to be discussed with House of Representatives, including Omnibus Law. Without mutual consent bill draft cannot be proposed again in the council court in that period.</p>
<p>Kata kunci: Omnibus Law, Keputusan Presiden</p> <p>P-ISSN: 1412-310x E-ISSN: 2656-3797</p>	<p>Abstrak</p> <p><i>Presiden Jokowi dalam kepemimpinan keduanya memiliki dua program besar. Pertama, memelihara negara Pancasila dan mempercepat pembangunan nasional. Program keduanya menyangkut penyederhanaan regulasi domestik yang terkait dengan perekonomian melalui Omnibus Law sebagai reaksi atas pergeseran kekuatan ekonomi global. Persoalannya adalah apakah penyelenggaraan sistem hukum negara Indonesia dapat menerima model Omnibus Law atau tidak jika dilihat dari perspektif ketatanegaraan atau dari hirarki peraturan perundang-undangan di Indonesia (dengan memperhatikan persyaratan konstitusional, artinya tidak bertentangan dengan UUD 1945). Dalam Pembukaan RUU Omnibus Law disebutkan pasal 5 dan pasal 20 UUD 1945. Sebagai persyaratan formal, kedua pasal tersebut memberikan ruang yang cukup. Dalam pasal 5 ayat 1 disebutkan bahwa Presiden berhak mengajukan undang-undang. Selanjutnya pada pasal 20 ayat 2 dan 3 disebutkan bahwa semua RUU harus dibahas dengan DPR, termasuk Omnibus Law. Tanpa adanya kesepakatan bersama, rancangan RUU tidak dapat diajukan lagi di sidang dewan pada periode tersebut.</i></p>

INTRODUCTION

The purposes of the country which form the basis of the administration of the Government of the Republic of Indonesia are to protect the whole people of Indonesia and the entire homeland of Indonesia, and to promote general prosperity, to enrich the life of the nation, and to contribute to the implementation of the world order based on freedom, lasting peace and social justice.

In terms of the economy, Indonesia is a country that lives side by side with other countries and the economy of Indonesia is always influenced by the global economic situation. National and global economic environment encounters continuously dynamic changes, partly due to fluctuations in commodity prices and trade policies and rise of other countries' interest rates.

In the past 5 years, global conditions have been over shadowed by uncertainties and an economic deceleration. The International Monetary Fund (IMF) predicts that global economic growth will still experience a deceleration, where developed countries will only grow by an average of 1.8% while developing countries are predicted to grow by 4.4%. World Bank also predicts that world economic growth will be lower than that of the same period last year, which was only 2.7%.¹

This is what President Jokowi intends to counter in the second period of his leadership. There are two major programs to do when consolidating the elite in the second period of his leadership: maintaining the *Pancasila* state and accelerating national development.

The first program is a reaction to the blindly exploitation of identity politics during the 2019 Presidential Election; the second program is a reaction to the global economy power shift by simplifying domestic regulations related to the economy. The latter is through Omnibus Law. In his inauguration speech (Sunday, October 20, 2019), President Jokowi said that his government would propose and introduce Omnibus Law. This will revise several laws at once.

Indonesia is still quite unfamiliar with the term Omnibus Law. Therefore, since its first appearance in President Jokowi's speech, the term has become a serious debate among law academics and the public. Omnibus Law is derived from Latin word meaning "for everything". The concept of Omnibus Law means one constitution that covers a number of diverse topics and is related to the field to be regulated.²

In the United States, for example, as a country that frequently uses Omnibus Law model, it is usually used for fields related to government agency funds, or shutdown issues (relating to the economy). They have started using it since the 19th century. While in Canada, Omnibus Law has also been used. Meanwhile Australia, article 55 in its constitution contains a law that changes a number of tax regulations. The most famous is the criminal law amendment Act in 1968-1969. In Ireland they used Omnibus Law in the second amendment to its constitution in 1941. The latest in 2016, in New Zealand, it concerned trans-Pacific cooperation. Some that practice Omnibus Law are countries of common law family. Law scholars from common law family are rather passive to group the law. They prefer to do abridgment, or "legal summary". In other words: summarizing the law to be more systematic. Blackstone was the pioneer of this work. Until now, the tradition of summarizing the law is still dominant. As a result, the law gradually resembles a mere encyclopaedia. It is boring and without philosophy. If it is adopted into the Indonesian legal system which is very dominant in Continental Europe, it seems rather difficult.

Jokowi Government³ has currently proposed Omnibus Law to *DPR* (House of Representative) and is being discussed in *Panja* (Standing Committee). Several other Omnibus Law are being prepared by the government. Based on the consideration of the draft of Omnibus Law, it is known that Omnibus Law that Jokowi government intends to practice is a method. Thus Omnibus Law is a method to revoke several articles at once in various laws related to one law. Whether our legal system can accept this Omnibus Law model is still a question viewed from both the constitution and our legal hierarchy.

1 The global economy tends to fade, although some sectors show increasingly bright prospects such as the financial sector (World Bank Group, Global Economic Prospect, June 2019, 2019; World Bank Group, Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications, 2018).

2 *Mengenal Omnibus Law dan Manfaatnya dalam Hukum Indonesia*, <https://www.hukumonline.com/klinik/detail/lt5dc8ee10284ae/mengenal-omnibus-law-dan-manfaatnya-dalam-hukum-indonesia/>, accessed on 12 July 2020.

3 Omnibus Law Draft, whether our legal system can accept this Omnibus Law model is still a question viewed from both the constitution and our legal hierarchy.

DISCUSSION

Constitutional Requirements

One of the conditions that must be fulfilled by a modelling law such as Omnibus Law is a constitutional requirement, meaning that it is not against what is stated in 1945 Constitution.

In the preamble of the draft of Omnibus Law, it mentions Article 5 and Article 20 of 1945 Constitution. As a formal requirement, both articles provide enough space. Article 5 paragraph (1) states that the President has the right to submit laws. Next, Article 20 paragraph (2) and (3) states that all bills must be discussed with DPR (House of Representative), including the Omnibus Law. If there is no mutual agreement, a bill may not be submitted again during the trial period.⁴

It is questioned whether the editorial of Article 5 paragraph (1) belongs to a law that uses Omnibus Law method (changing a number of articles in a number of laws into one law). It is still debatable since the general explanation of 1945 Constitution after the 2002 amendment has been abolished. Therefore, the interpretation of the two articles depends on the Constitutional Court. Meanwhile regarding Article 20 paragraph (2) and (3) it really depends on the political constellation in the DPR (House of Representative) whether Omnibus Law will be approved or not.

Formally, it is not clearly stated in article 5 and article 20 about the limitations of law type that may be proposed by the President. When viewed from the historical aspects of the preparation of the amendments of 1945 Constitution, in its sessions MPR (People's Consultative Assembly) never discussed Omnibus Law. Therefore, the spirit of Article 5 and Article 20 of 1945 Constitution after the amendment does not depart from the possibility that Omnibus Law will be adopted into our legislation one day. Amendments of 1945 Constitution do not depart from such needs.⁵

In the future, it is possible to introduce many models of law into the Indonesian legal system. If constitution does not clearly provide understanding and limitation, there can be legal conflicts here and there. This is what is currently happening in Omnibus Law proposed Jokowi government.

Chapter VI of 1945 Constitution, as an example, gives broad powers to the regions based on the principle of autonomy and financial affairs, natural resources and other resources between the central government and the regions that must be fairly regulated. Then, in relations with Omnibus Law. It seems that Omnibus Law experiment is too hasty without serious constitutional considerations. Moreover, it becomes potential for law abuse. There are about 37 times the words "determined by the Central Government" and approximately 510 times the words "governed by Government Regulations" are mentioned for affairs which are the domain of regional government. That damages two things: damaging the principle of *freiesermessen* (privilege) of the local government in taking strategic steps in its territory; and undermining the principle of regional government discretion in financial sector. The spirit of the bill is clearly intended to restore executive heavy, centralized authority like in the New Order era.

Furthermore, in Omnibus Law more than 1000 pages mentions Article 33 of 1945 Constitution only one time in the preamble section specifically only paragraph (5). However, for that matter the cores of Article 33 are paragraph 1, 2 and 3 - which are the basis of the country's economic politics. This bill changes the direction of economic politics to become centralized-capital. Omnibus Law, for example regulates land matters. However, no section mentions the UUPA (Agrarian Law) in 1960 both in preamble and in its articles. The agrarian reform referred to in this bill is not in accordance with what is mandated by UUPA, since Omnibus Law only regulates the issue of land banks and centralized land management rights depending on central government: free to be used for cooperation with the third parties (private-capitalists).

In fact, the most urgent thing to implement by Jokowi government is the unification of law by synchronizing and revising the environment in the executive norm hierarchy, ranging from government regulations, presidential regulations, and provincial / regency / city regional regulations to villages despite Omnibus Law. This due to the fact that the focus of Jokowi government program is the economic field. Therefore, it is not necessary to summarize thousands of articles and dozens of laws into one. If the latter is implemented, a lot of body rights (and branches of regional power, etc.) will be castrated.

Legislation Hierarchy Requirements

It must be honestly recognized that Omnibus Law proposed by the government has disrupted the principles of statutory law that so far have been practiced in our state administration. The government has been mistaken, premature, and hasty to adopt the idea of Omnibus Law without preparing its legal basis in advance. That will lead to a conflict of law principles such as *lex specialis derogat legi generalis* (rules that specifically ignore general rule). Therefore, it must be regulated in a hierarchy of legislation regarding its position.

⁴ 1945 Constitution comparison of original and changing manuscripts, 2005, Jakarta; Social Library, Vet Cet, p. 55.

⁵ Minutes of Amendment to the 1945 Constitution, 1999-2002, published by the Secretariat General of the People's Consultative Assembly of the Republic of Indonesia, 2010, p. 90.

Our legal drafting technique is by using the legal basis of Law No. 15 of 2019 concerning changes to Law No. 12 in 2011. Previously, there was Perpres (Presidential decree) No. 87 of 2014 – as a direct derivation of Article 5 paragraph (1), Article 20, and Article 22 A of 1945 Constitution. The Government does not mention Law No. 15 of 2019, Law No. 12 of 2011, and Presidential decree No. 87 of 2014 in consideration of proposed Omnibus Law.

As a method stated in the preamble, Omnibus Law is unknown in the technique of drafting our laws as regulated in Law No. 12 of 2011, Law No. 15 of 2019, and Presidential decree No. 87 of 2014. There is no single phrase that mentions, and or can be interpreted that to establish legislation, the method of changing several Articles of several Laws at once into one Law can be used. There is no such mention.

Prior to proposing Omnibus Law the government should propose to jointly determine the legal basis first to DPR (House of Representative), when revising Law No. 12 of 2012 and Presidential decree No. 87 of 2014 as the example. There must be mentioned that Omnibus Law, as a method, can be used in the practice of our statutory law. Thus the government (and DPR) have a legal basis.

CONCLUSION

The political action of Jokowi government by introducing Omnibus Law into our legal system reinforces an old paradox: the tendency to imitate the capitalist state patterns of the Anglo Saxon legal ecosystem that emphasizes high economic growth and the acceleration of industry by simplifying regulation through Omnibus Law.

In the past, in the era of Suharto's power, he established an order of economic development (liberalization). Law served the purpose of development slogans. It meant law was converted to rationalize government action.

An architect, an international law professor, was appointed to carry out this task: Mochtar Kusumaatmadja.⁶ A project combines both executive and DPR (House of Representative) regulations (at that time DPR (House of Representative) could be controlled by the executive) into a single draft development plan. This was also a kind of unification, but its scope is similar to Omnibus Law. The results can be read in the Second REPELITA text (Chapter XXVII, paragraph IV point 1). The point was prioritizing draft laws and regulations that were in the same direction and was not against the objectives of economic and social development. Mochtar wanted to imitate America.

As written in Jimly Asshiddiqie's dissertation (1994: 204), Mochtar's experiment produced quite a lot of economic-related legal products - during 1967-1983, which was around 32%. Ironically, only 11.6% of all economic regulations actually referred to Article 33. There had been a massive and structured shift from collectivism to individualism-liberal-capitalism. This means the wave of economic liberalization is proceeding smoothly. The peak was the economic crisis of 1997-1998.

The mindset of Jokowi government, in this case through Menkumham (Minister of Law and Human Rights) Yasona Laoli as the architect of Omnibus Law, is somewhat similar to what Mochtar did. And that reminds to all the negative memories in the past. Omnibus Law is no better than Mochtar's project in the past.

Since the term Omnibus Law was introduced. We are easily impressed by the terms we have just heard - as we are impressed with the statistics of economic growth - and we are bound by such admirations for experimenting to develop the country.

This fact shows that our jurisprudence has long stagnation, limited ideas and new findings. In practice, legal practitioners are likely to conduct a routine: litigating in court, defending clients, handling paperwork, etc. In short, there are no new breakthroughs. Our state administration law is just stuck on the same routine: formulating norms neglecting philosophical basis that honor the values of justice.

⁶ Soetandyo Wignjosebroto. 1994. *Dari Hukum Kolonial ke Hukum Nasional: Suatu Kajian Tentang Dinamika Sosial-Politik dalam Perkembangan Hukum Selama Satu Setengah Abad di Indonesia (1840-1990)*, Jakarta: RajaGrafindo Persada, p. 197-224.

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