

THE LEGALITY OF THE OMNIBUS LAW FROM FULLER'S PERSPECTIVE

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ABSTRACT

Omnibus can create legal certainty by directly regulating a bunch of facts that are intertwined in the legal system. This method is considered to be more effective than creating individual laws and regulations, which can lead to duplications and inconsistencies between regulations. Contrary to this ideal concept, the Indonesian Government's Comprehensive Law or Preparation Law must be conditionally overturned by the Constitutional Court by Constitutional Court Decision No. 91 / PUUXVIII / 2020. As the legislative body responsible for enacting the law, DPR has two years to fix the formal flaws in Undang Undang Cipta Kerja. This study uses the nature of the doctrine study, the conceptual approach, and the legal approach to describe the management aspects of Undang Undang Cipta Kerja as an omnibus method using Lon L. Fuller. This analysis provides an overview of the strengths and weaknesses of Undang Undang Cipta Kerja in terms of superior legal quality. Recognizing the weaknesses of publications that exist in the process of creating and implementing Undang Undang Cipta Kerja may be recommended to the government if it meets the formal improvement deadline required by the Constitutional Court to maintain omnibus law. I can do it. It will bring positive benefits to Indonesia's investment environment. Keywords: omnibus law, principle of legality, UU Cipta Kerja

Keywords : Omnibus Law, Legality, Perspective

INTRODUCTION

As a form of the government's seriousness in providing legal certainty for all Indonesian citizens, then a law was drafted which could be a solution to various legal problems that have occurred so far. This effort is implemented by adopting a model for the formation of an Omnibus Law. According to the Duhaime Legal Dictionary, Omnibus Law itself is interpreted as a form of legal product consisting of several substances so that its benefits can be felt. This regulation was produced by the legislature as a means to maintain legal consistency from several integrated sectors. The Model Law in the form of the Omnibus Law then appeared in Indonesia in the form of Law Number 11 of 2020 concerning Undang- Undang Cipta Kerja (hereinafter referred to as Undang- Undang Cipta Kerja).

As a form of regulation that has just been adopted by Indonesia, the Omnibus Law has drawn criticism from various circles. As Duhaime has interpreted, the Omnibus Law, which should have focused on the benefits of simplifying regulations, has created a polemic in the community because it seems rushed. Various criticisms began to emerge from various circles, ranging from academics to practitioners after the work creation law was published. The difference in the content of the draft material that was spread in the mass media, the difference

in public perception of the articles in the Law and the public's uncertainty that arose because they felt they were not involved in the making of Undang- Undang Cipta Kerja then triggered a Judicial Review application which was submitted to the Constitutional Court.

The request for a Judicial Review submitted by Migrant CARE, the Coordinating Board for the Customary Density of Nagari West Sumatra, the Minangkabau Customary Court and Muchtar Said was later partially granted by the Constitutional Court. Through Decision Number 91/PUU-XVIII/2020, the Constitutional Court stipulates that the implementation of Undang- Undang Cipta Kerja must be suspended due to a formal defect in the law-making process. To improve this, the DPR as a legislative body has a deadline of 2 (two) years. If then the limit has been passed, then the constitutionally unconstitutional status of the Constitutional Court will the unconstitutionality of Undang- Undang Cipta Kerja will be permanent. One of the considerations of the Constitutional Court in determining the decision is the difficulty of access for people who want to get the Academic Manuscript of Undang- Undang Cipta Kerja. In addition, in the meeting to discuss the draft of the Undang- Undang Cipta Kerja Bill, the people involved in the discussion also admitted that they did not fully understand the material of the Act being discussed, so that the active role of community groups to provide input on the material of Undang- Undang Cipta Kerja was very limited.

Starting from these problems, it can be seen that Undang- Undang Cipta Kerja as an Omnibus Law still has weaknesses in its administrative process. The Constitutional Court's decision which still provides an opportunity for the DPR to perfect the mechanism for making legal products in accordance with the provisions of Law Number 12 of 2011 concerning the Establishment of Legislations can be a way for the community to continue to enjoy the benefits of the Omnibus Law. As stated by Lon L. Fuller, a regulation needs to meet the eight characteristics of the legality principles to be able to meet the requirements of good administration. The eight principles include: (1) Law must be general or general; (2) Good Publication Aspects; (3) set the conditions that will occur; (4) has a clear material content; (5) must not contain contradictory content; (6) not ask the impossible; (7) have the consistency of material charge; (8) has a match between the promulgated material and its enforcement.

Based on these well-administered legal characteristics, then the Omnibus Law on Undang- Undang Cipta Kerja will be analyzed. This study is important to ensure that formal improvements made to Undang- Undang Cipta Kerja are not only for administrative purposes, but can also finalize preparations for the implementation of Undang- Undang Cipta Kerja so that it can be well received by the public. This effort is a supporting step for the government, so that the purpose of making the Omnibus Law which is intended to be used as a way to strengthen the investment climate in Indonesia can be realized properly.

METHODS

This research was conducted using a normative juridical method or commonly referred to as doctrinal research. The development of the concept put forward by the makers of the doctrine on the applicable legal norms is the way to carry out the analysis in this study. To sharpen the knife of analysis, a conceptual approach and legislation will be used. The primary source of study material used is Undang- Undang Cipta Kerja as an Omnibus Law and the secondary

source of legal material comes from books, literature, scientific journals and research results. The technique of collecting materials was carried out by the library study method.

DISCUSSION

The operation of a government system based on law needs to consider the values that will be contained in each regulation. As explained by Lon L. Fuller, legal norms are used by the government to regulate society based on prevailing moral values ¹. In his book, Fuller explains about the morality of duty and morality of aspiration. These two moral values will greatly affect the construction of a regulation. In the concept of morality of duty, the rule of law will contain a provision that limits an action or allows an action to be carried out ². In this context, policy makers will apply sanctions for people who violate the applicable provisions, but will not provide penalties for those who do not maximize their potential. Broadly speaking, morality of duty can be analogized as a grammar in communication, while morality of aspiration is the values that want to be emphasized in these rules.

In a moral value of aspiration, there is a content of ideals or ideal forms to be achieved. The existence of a shadow of an ideal condition that may be achieved by mankind is the basis for the conception of a shadow of heaven ³. To be able to achieve the ideal form that is aspired to, then in the concept of morality of aspiration there is a mechanism to maximize one's potential. This moral value will design so that the legal subjects of the regulation can maximize what they have and not focus on preventing the bad impacts that might occur.

For a legislator, the moral values of aspiration which contain the potential and ideal forms that are imagined are a very important capital to determine the morality of duty that he will make. Values that contain limits, prohibitions, recommendations and sanctions contained in a regulation are a form of development and adjustment of the potential and goals to be achieved. The good or bad of a standard of living is determined because of the perspective that views an ideal form of life ⁴. Maturation of this concept is very important for the usefulness and achievement of the objectives of making a regulation. These values become a non-instrumental part that is attached to a rule of law. This provision is the basis for public understanding to behave and act so that a social order is then created that is subject to the law as a means for them to arrive at an established form of life ⁵.

As a follow-up to a draft law that already contains moral values, Fuller emphasizes the importance of the administrative process of the rule of law. Good regulation is certainly not only limited to a regulation that has a noble purpose, but must also be implemented in the community. For this reason, it is necessary to have sensitivity from regulators to the characteristics of a good rule of law. This is so that these regulations can legally apply in the community and are voluntarily obeyed by their addressees. Based on these considerations, Fuller explained further about the eight principles of legality as a guide for spawning an implementable legal product.

By analyzing the concept of the principles of legality, Fuller wants to provide an overview of the aspects that may need to be strengthened when facing obstacles in the process of implementing a policy. The eight principles include: (1) Law must be general or general; (2) Good Publication Aspects; (3) set the conditions that will occur; (4) has a clear material content; (5) must not contain contradictory content; (6) not ask the impossible; (7) have the

consistency of the material charge; (8) has a match between the promulgated material and its enforcement. Each of these aspects has an equally important position in ensuring a good legal product administration process¹.

The first aspect is related to the nature of the legal rules made. According to Fuller, a good rule of law is a general rule. The general nature of a legal rule is closely related to who will be the addressee of the regulation and also the purpose of enforcing the rules made. To be able to create conditions for a just society, a rule of law must be able to accommodate every need of the community, however, this does not mean that the regulation will only focus on or defend a particular group. For this reason, equality before the law becomes an inseparable part of the process of making laws. For Fuller, a good law is one that can be applied to all its addressees without exception. In addition, the law must also be able to be used and enforced in general so that the legislature does not need to make new rules every time it encounters a similar case. The second concept, the successful implementation of a law is closely related to good publication. Although there is a legal fiction principle which states that everyone is considered to know the law, but to be able to implement a good rule of law, this principle cannot be applied just like that. The third principle in making a good regulation requires that policy makers be able to provide legal content that regulates future conditions. In this case, Fuller emphasizes the importance of the law which does not apply retroactively but is more prospective. This provision is based on the need to protect the public as the address of a rule of law.

The fourth principle of a well-administered legal product is related to the clarity of the provisions contained therein. Real limitations regarding prohibitions, appeals and recommendations contained in a regulation must be formulated in a form of a series of words that can be understood by everyone. The fifth principle of a good regulation lies in the harmony between the rules of law that exist in the same legal system. In this case, Fuller explains that among the norms that are made there should be no contradictory values and provisions between one another. Furthermore, the sixth principle of the characteristics of good law is marked by the existence of legal rules that must be fulfilled by its address. In this context, the government may not make a provision that requires someone to do something that is impossible to do, or not ask the impossible. This is closely related to one of the objectives of making a regulation, namely to obtain compliance from the community in carrying out certain provisions so that the objectives of making the regulation can be achieved.

The seventh principle that must be adhered to in order to produce a well-administered regulation refers to the consistency of a law. In this case, the consistency of regulation is a consequence of the prospective principle as well as legal clarity. As it is known that the statutory regulations that have been legally recognized have binding legal force which requires the address to comply. The last aspect relates to the compatibility between the material that was promulgated and also the enforcement of the rule of law. Conformity in an effort to enforce the law is certainly greatly influenced by the clarity of the material from the Act that has been made.

DISCUSSION

In order to provide an overview of the administrative process of Undang- Undang Cipta Kerja and an analysis of its benefits in the future, it is appropriate to conduct an analysis of the legal principles that underlie the formation of this Omnibus Law. The results of the analysis can be used as input for the government during the deadline for improving the constitutionality of Undang- Undang Cipta Kerja. The first aspect of the eight principles of legality put forward by Fuller is concerned with the scope of the Act. Clearly, when viewed in terms of generality which is defined by Fuller as a main requirement of the Act, then Undang- Undang Cipta Kerja has been able to fulfill these elements well.

As previously explained, the generality of the law is intended so that the law does not only apply to certain groups or only applies narrowly by resolving certain cases. In this aspect, the Employment Copyright Law is of course very general in nature because it can be used to regulate general business licensing procedures with the boundaries of several interrelated sectors. This law is also a reference for entrepreneurs, ranging from those who run low-risk businesses to high-risk businesses. In addition, the scope of the legal rules summarized in the Omnibus Law can integrate licensing procedures from the center to the regions so as to create harmony and integration between applicable legal rules. Thus, it has been seen that Undang- Undang Cipta Kerja has more power when compared to other laws in the perspective of generality from the scope of its regulatory area.

The second aspect of the principle of legality is publication. In this context, Fuller emphasizes the importance of publication during the formulation and ratification of a law. Publication is an important part as a form of education and community participation networking so that these rules can be obeyed and applied optimally to achieve the morality of aspiration which is the basis for making these regulations. However, this aspect does not appear to be optimal in the practice of making and implementing Undang- Undang Cipta Kerja. As later, this was proven by the Constitutional Court's Decision Number 91/PUU-XVIII/2020 which stated that Undang- Undang Cipta Kerja was proven to have a formal defect so that it was declared conditionally unconstitutional. One of the grounds for a judicial review of Undang- Undang Cipta Kerja is public unrest who thinks that this Law is not well publicized so that people's aspirations are not summarized and the data is confusing after the enactment of Undang- Undang Cipta Kerja. It is difficult for the public to find a valid draft of academic text and also an official text that has been promulgated.

In addition, the publication aspect which is still weak has made the public as legal subjects of the regulation experience difficulties in understanding the material content and morality of aspiration owned by the government when determining the morality of duty contained in the regulation. As a consequence, rejection and criticism from various circles began to emerge shortly after the regulation was enacted. The cuts to the powers of local governments related to the issuance of business licenses, centralized supervision and the abolition of criminal sanctions are very troubling to the public. In addition to later becoming a form of centralization of power, the Omnibus Law as outlined in Undang- Undang Cipta Kerja is seen as impartial to observers of environmental issues.

This condition is certainly a logical consequence of the application of the Omnibus Law model which is indeed widely used in the common law system⁶. The main purpose of making the Omnibus Law is to streamline the legislative process so as to create a harmonious and integrated legal unity. But on the other hand, the shortcomings of the Omnibus Law form are in: (a) ignoring the formal provisions of making laws; (b) narrowing the space for public participation and transparency; (c) increase the regulatory burden in the event of failure in its implementation.

The third aspect relates to the prospective nature of the enacted laws. In this context, Undang- Undang Cipta Kerja has become the spearhead for the government to facilitate investment permits in the future. Thus, it is certain that this regulation will be used to meet Indonesia's investment needs in the future. The implementation of an investment increase strategy based on best practice investment licensing procedures is the government's way of preparing the Indonesian bureaucracy so that it can compete with other countries in the future. For this reason, it can be said that the prospective aspects of Undang- Undang Cipta Kerja have strengths and virtues in the field of investment and government administration.

The fourth aspect of Fuller's legality principle requires that there be clarity on the material content contained in the Act so that the address of the Act does not experience difficulties in complying with it. In the context of Undang- Undang Cipta Kerja as an Omnibus Law, this aspect is quite difficult to fulfill. Apart from a change in the approach taken in granting investment permits (from a license approach to a risk-based approach), there are too many sectors that are regulated simultaneously, thereby reducing the systematic clarity of the Act.

The fifth aspect relates to harmonization between regulations in regulations that exist within the same legal system. Related to this aspect, of course Undang- Undang Cipta Kerja has advantages and strengths when compared to other laws. This can be seen in the purpose of making the Omnibus Law model, which wants to cut legal rules that are mutually exclusive so that there is no longer overlapping policies that can hinder the investment climate in Indonesia. The centralization of policy in the hands of the president with the existence of the NSPK is a guarantee of certainty that there are no longer contradictory legal rules. In fact, the president has the authority to revoke local regulations that contradict the president's directives.

Sixth, laws made by the government must not ask for something that is impossible to do. Of course this is not in Undang- Undang Cipta Kerja. As a law designed to facilitate business permits, increase investment and cut down complicated licensing procedures, of course the government will not ask entrepreneurs to fulfill investment requirements that are impossible to obtain. As previously explained, businesses with low risk are only required to register, businesses with moderate risk are asked to apply business standards and businesses with high risk are still required to have an environmental permit and AMDAL.

Seventh, related to the consistency of the Omnibus Law rules that are enforced, until now, the Constitutional Court is still delaying the implementation of these rules. Only the formal eligibility section must be addressed to ensure that Undang- Undang Cipta Kerja does not exceed the time limit given by the Constitutional Court so that it becomes permanently unconstitutional. Thus, it can be said that there will be no material changes that will be made by the government in relation to the Act. This needs to be a concern because Undang- Undang Cipta Kerja was made to ensure that there will be improvements and improvements to the investment climate in Indonesia. In order to attract investors to Indonesia, consistent legal rules

are needed and can maintain stability and legal certainty during the investment period of the company.

The last aspect of the legality principle put forward by Fuller emphasizes the compatibility between the enacted rules and law enforcement against these rules. This aspect cannot be seen clearly because the implementation of Undang- Undang Cipta Kerja which is still pending by the Court means that there is no enforcement that can be done to the rule. However, the Omnibus Law passed by the government has eliminated criminal sanctions that may be imposed on violators and replaced these penalties with administrative sanctions. This provision can weaken the enforcement of the provisions contained in Undang- Undang Cipta Kerja and ensure that there is protection for the people who live around or are affected by the business being carried out.

CONCLUSION

From the explanation of Law Number 11 of 2020 concerning Undang- Undang Cipta Kerja as a form of Omnibus Law owned by Indonesia based on the criteria of the eight principles of legality proposed by Fuller, there are weaknesses and strengths of the Act. Aspects of publication, clarity of legal content and conformity between legislation and enforcement of these regulations still need to be strengthened. The limited aspirations of the public to be involved in policy making is a consequence of the form of the Omnibus Law, but the government still has to carry out the publication function as a form of education for the addressees of the Act. Eliminating criminal sanctions and replacing them with administrative sanctions could weaken enforcement of the rules that the government has made to protect these investors.

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