

Constitutionality of The Omnibus Law Number 11 of 2020 on Job Creation

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Submitted: 2022-10-12 | Reviewed: 2022-10-14 | Revised: 2022-11-23 | Accepted: 2022-11-24

How to cite: Marpaung, Jessica Vincentia, et al. "Constitutionality of The Omnibus Law Number 11 of 2020 on Job Creation." *Dialogia Iuridica*, Vol. 14, No. 1, 2022, pp. 171-202.

DOI:

<https://doi.org/10.28932/di.v14i1.5405>

ABSTRACT

The concept of "Omnibus Law" has been a topic of controversy in Indonesia from the moment it was proposed by President Joko Widodo to date. Throughout 2020, out of the 50 draft laws to be prioritized in the National Legislation Program, the Job Creation Draft was undeniably the most discussed and disputed. Debates revolved around not only the material content of the draft law (among others, the potential yet dilemmatic revocations or amendments of other laws and legislations resulting from the enactment of such cross-sectoral law), but also the procedural soundness of its legislative process (among others, the issues of transparency and representation in the legislative drafting process). These debates point towards not only the constitutionality of "Omnibus Law", but also the political will of the law itself – aspects that were all the more pressing to be scrutinized as the Government moved on to crystalize the Job Creation Draft Omnibus Law into a positive law, namely Law Number 11 of 2020 on Job Creation. This research will investigate three indispensable aspects. First, investigate into the constitutionality and resulting enforceability of

Job Creation Law. Second, dissect relevant aspects of said Omnibus Law and determine its impacts to applicable laws and legislations. Third, eventually venture to utilize all the mentioned analysis, synthesize a conclusive observation of Job Creation Law. Other than establishing the said analysis, this research will hopefully provide a set of indications of how the Job Creation Law, and in turn, Omnibus Law in general, will be enforced in Indonesia.

Keywords: omnibus; constitution; job creation

I. INTRODUCTION

Indonesia's current administration, under the leadership of President Joko Widodo (hereinafter, Jokowi), has consistently communicated the commitment to ensuring a stable and welcoming climate for investment activities in Indonesia. Currently, the World Bank's 2020 Doing Business index lists Indonesia at the 73rd overall position, out of 190 countries, in terms of the ease of doing business.¹ President Jokowi has set the target of increasing Indonesia's ranking to the 40th overall position.² The Government realizes that "desired investment does not come from only domestic, but also foreign investors in the form of foreign investment" and that "Indonesia as a country in need of investment to finance its development and must improve the time, procedure, and cost spent for establishing business, primarily through policy and regulatory reforms".³

Excessive and overlapping regulations, coupled with institutional inefficiency, have become major impediments to investment in Indonesia. To eliminate these problems, President Jokowi proposed the enactment of an Undang-undang Omnibus or Omnibus Law, which is commonly understood as a piece of major legislation that

¹ World Bank. "Comparing Business Regulation in 190 Economies." *Doing Business*, 2020, pp. 001-135, <https://doi.org/10.1596/978-1-4648-1440-2>.

² CNBC Indonesia. "Jokowi Ingin Kemudahan Berusaha (EODB) RI Naik ke Peringkat 4." *CNBC Indonesia*, February 2020, <https://www.cnbcindonesia.com/market/20200212162613-19-137390/jokowi-ingin-kemudahan-berusaha--eodb--ri-naik-ke-peringkat-4>.

³ BPHN. "Academic Text for Job Creation Draft Bill." *BPHN*, January 2020, <https://bahasan.id/wp-content/uploads/2020/02/NA-RUU-CIPTA-LAPANGAN-KERJA-Luwansa-20-Januari-2020-BPHN-16.21.pdf>.

covers more than one substantive area of law (*i.e.*, is cross-sectoral), aimed at streamlining Indonesia's currently '*obese*' and rather cumbersome legal system into a more compact, harmonious, and comprehensive one. One of the most comprehensive Draft Omnibus Law was disseminated in 2020, namely the Job Creation Draft Omnibus Law, which comprised 15 Chapters and 174 Articles, aimed at streamlining (*i.e.*, amending or revoking) 79 relevant laws. Such proposal has been met with various responses from relevant stakeholders across the nation. On the one hand, many commentators see the Omnibus Law as a practical solution to the alleged over-regulated society that hinders investment, but on the other hand, critics are concerned with the efficacy, political intention, and constitutional soundness of the approach.

Despite remaining concerns and debates surrounding Job Creation Draft Omnibus Law, the Government proceeded to enact Law Number 11 of 2020 on Job Creation (Job Creation Omnibus Law) as positive law. This calls for further analysis on whether such Omnibus Law could effectively be implemented in Indonesia to attain the purposes of legal certainty, utility, and justice by, among all others, looking at issues of constitutionality, functionality, and political will of law underlying the enactment of Job Creation Omnibus Law.

In order to make thorough legal assessments on the implementation of Job Creation Omnibus Law, the following questions have to be fully considered: In consideration of constitutionality issues, how does Omnibus Law function within the hierarchy of Indonesian Legal System and how is Job Creation Law enforced to ensure the fulfillment of purposes of law? The main purpose of this Research is to clarify both the implementation and enforceability of Job Creation Omnibus Law, in consideration of the constitutionality of Job Creation Omnibus Law.

II. DISCUSSION

1. Omnibus Law in Indonesia

The idea of an Omnibus Law as a feasible solution to organise and address the legislative and regulatory challenges of the country was mentioned prior to President Jokowi's initiative, specifically by Indonesia's Coordinating Minister of Economic

Affairs Sofyan Djalil in 2017. However, until recently, the idea had never been fully realised into actionable policy.⁴ Omnibus Law was created by the Jokowi administration to push ahead with infrastructure and economic development through investment.⁵ Representing the culmination of a signature policy of the President, this Law was aimed at simplifying overlapping regulations and boosting foreign direct investment by improving the ease of doing business.⁶

Omnibus is a method of forming laws and regulations that is commonly used universally. However, the substance of a draft law prepared using the omnibus method must not conflict with the 1945 Constitution. Therefore, the Government and the legislatures need to withdraw the Job Creation Bill from the discussion process, rearrange the provisions of the Articles of the Job Creation Bill, and break it down into sections. In several draft laws, eliminating irrelevant articles, and carrying out the drafting and re-deliberation stage by involving community participation which places the community and the government in equal decision-making positions (equal bargaining power).⁷ The omnibus law is also considered to be a means of harmonizing various regulations related to business licensing in Indonesia, which still overlap.⁸

Historically, one of the first legal instruments in Indonesia that is deemed to have the character of an Omnibus Law is Law No. 5 of 1960 on Basic Agrarian Principles (hereinafter, Agrarian Law). Through the enactment of the Agrarian Law, the legal pluralism previously marked by the existence of various levels (promulgated by the King of the Netherlands, such as *Koninklijk Besluit No. 29* as a Royal Decree by King William III,⁹ and by the Parliament, such as the *Agrarische Wet* or *Agrarian Law*) of Dutch laws no longer existed. Discriminatory and unfair Dutch laws were revoked

⁴ Arieza, Ulfa. "Omnibus Law, Sofyan Djalil Pede Urus Izin Bangunan Hanya Sehari." *Okezone TV*, February 2017, <https://economy.okezone.com/read/2017/02/16/470/1620215/omnibus-law-sofyan-djalil-pede-urus-izin-bangunan-hanya-sehari>.

⁵ Iannone, Aniello. "The Development of Jokowi's plan; why the Omnibus Law is good for the economy but a threat to civil rights in Indonesia." *Pssat.Ugm*, November 2021, <https://pssat.ugm.ac.id/the-development-of-jokowis-plan-why-the-omnibus-law-is-good-for-the-economy-but-a-threat-to-civil-rights-in-indonesia/>.

⁶ Mahy, Petra. "Indonesia's Omnibus Law on Job Creation: Legal Hierarchy and Responses to Judicial Review in the Labour Cluster of Amendments." *Asian Journal of Comparative Law*, Vol. 17, 2022, pp. 051-075, <https://doi.org/10.1017/asjcl.2022.7>.

⁷ Juwana, Stephanie. *Policy Brief 4: Sistem dan Praktik omnibus Law di Berbagai Negara dan Analisis RUU cipta Kerja dari Perspektif Good Legislation Making*. Jakarta, Indonesia Ocean Justice Initiative, 2020, p. 4.

⁸ Academic Manuscript of the Job Creation Law Draft, pp. 004-010.

⁹ State, Paul F. *A Brief History of the Netherlands*. New York, Infobase Publishing, 2008, p. 132.

and the remaining laws were streamlined to become the unified set of the Agrarian Law, catered to the Indonesian national interest. Following the Agrarian Law, several other laws were enacted that were intended to amend, and at the same time, streamline some parts of other relevant legislation: (a) Law No. 9 of 2017 on the Determination of Governmental Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Undang-undang, hereinafter, PERPU) No. 1 of 2017 on Information Access for Taxation Purposes as Law¹⁰ and (b) Law No. 23 of 2014 on Regional Government (comprised of 411 articles).¹¹

It should be highlighted that these laws were aimed at partially amending other relevant laws and treated neither as an ‘Umbrella Act’ nor an Omnibus Law. It is also worth noting that some other forms of legislation have also been enacted to regulate several other legal instruments at once, such as the Decree of People’s Consultative Assembly (hereinafter, MPR Decree) No. I/MPR/2003 on the Assessment on Legal Substance and Status of Temporary MPR Decree and MPR Decree of 1960, which prescribes a comprehensive list of the MPR Decrees that was to be revoked and deemed Jimly Asshiddiqie thinks that the omnibus bill is appropriate to be applied in Indonesia, not only in the context of consolidating the rule of law in the business sector, but also in the context of structuring the Indonesian legal system as a whole as an effort to reform national law.¹²

There are several steps that must be fulfilled by the House of Representatives to ensure that the omnibus law can be effective and is not misused by any party. First, the House of Representatives together with the government must involve all element of society at every stage of the discussion of the draft. Second, the House of Representatives and the government must be transparent in providing any information on the progress of the draft law formulation process. Third, the House of

¹⁰ Coordinating Ministry of Economic Affairs. *Penjelasan RUU Cipta Kerja*, Presented in Forum Group Discussion – FPG DPR RI “Omnibus Law Cipta Kerja: Jalan Pintas Menuju Indonesia Maju”, 26 February 2020.

¹¹ Redi, Ahmad. *RUU Omnibus Law Cipta Kerja: Sebuah Perbandingan Pengaturan*. Presented in Comparative Law Lecturer Association, 13 April 2020.

¹² Asshiddiqie, Jimly. *Omnibus Law dan Penerapannya di Indonesia*. Jakarta, Kompas, 2020, p. 017.

Representatives and the government must harmonize both vertically with higher regulations and horizontally with equivalent regulations so that they do not overlap.¹³

However, it is to be noted that a true Omnibus Law, which concerns various sectors and ultimately makes a major effort at legislative and regulatory streamlining, has never been explicitly recognized under the Indonesian legal system as a concept that is commonly understood and practiced previously.

2. Omnibus Law Within the Indonesian Legal System

Omnibus Law was mentioned for the first time as an initiative of Jokowi in his Inaugural Speech after being elected for his second term (2019 – 2024 period) in the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat/MPR*) parliamentary meeting on October 20, 2019. Emphasizing the need for Indonesia to aim to be a part of the world's five biggest economy (see Figure 1), Jokowi proposed five main working plans to be realized in his second term,¹⁴ namely (a) Development of human resources facilitated by scientific and technological advancement, (b) Development of infrastructure to boost up economy by revitalizing market, tourism, and employment, (c) Simplification of regulations through promulgation of Omnibus Law applied in the (1) employment and (2) Small and Medium Enterprises (SMEs) sectors as pilot projects, (d) Simplification of bureaucracy through structural reform, and (e) Transformation of the overall economy to escalate through the global value chain, founded on a sentiment that is echoed consistently by various levels of government that Indonesia must restructure its economic structure¹⁵ and corresponding infrastructure in order to gain significant economic growth and become competitive internationally.¹⁶

¹³ Putra, Hendra Kurnia. *Problematika Penerapan Omnibus Law dalam Pembentukan Undang-undang dalam Sistem Peraturan Perundang-undangan Indonesia, Omnibus Law: Diskursus Pengadopsiannya ke dalam Sistem Perundang-undangan Nasional*. Depok, Rajawali Pers, 2020, pp. 075-076.

¹⁴ Kompas.com. "Naskah Lengkap Pidato Presiden Joko Widodo dalam Pelantikan Periode 2019-2024." *Kompas.com*, October 2019, <https://jeo.kompas.com/naskah-lengkap-pidato-presiden-joko-widodo-dalam-pelantikan-periode-2019-2024>.

¹⁵ In his lecture at the 2019 Batch LIX Regular Training Program at National Development Planning Agency (see: <https://www.bappenas.go.id/id/berita-dan-siaran-pers/untuk-menjadi-indonesia-emas-2045-indonesia-harus-tinggalkan-struktur-ekonomi-kolonial/>, accessed on December 17, 2021) Bambang Brodjonegoro, the Minister of Research and Technology/Head of National Research and Innovation Agency, emphasized the urgency for Indonesia to change its colonial economic structure that focuses on natural resource exploitation into a national economic structure based on 4 pillars: (a) research and technological development, mainly in manufacturing; (b) sustainable economic development through the

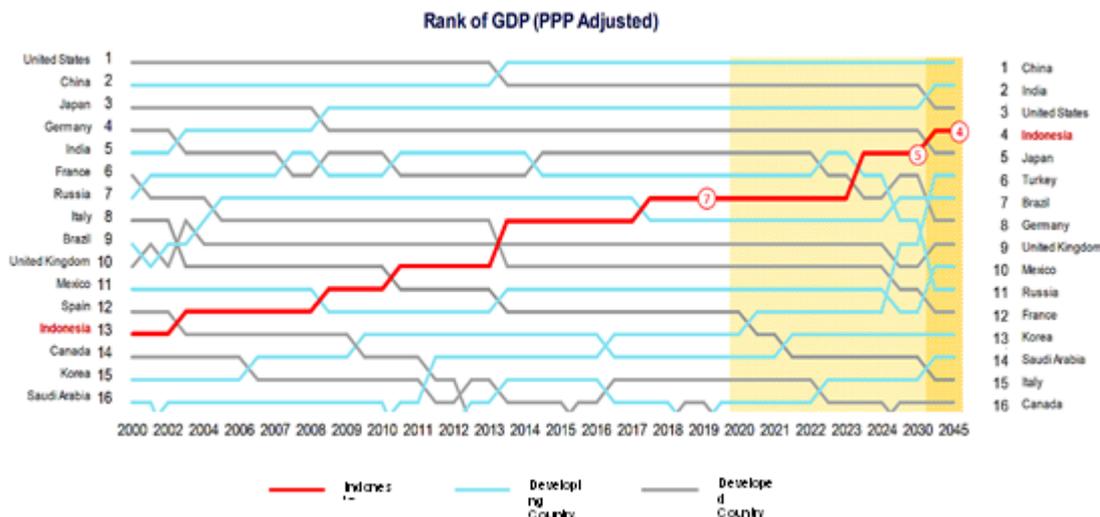


Figure 1. Indonesia's Income Projection Until Year 2040.

Source: Presentation on Job Creation Bill, Coordinating Ministry for Economic Affairs

Figure 2 below illustrates the Government’s strategic plan (known as 2045 Vision of Indonesia) to ultimately attain several goals: (a) establish itself as a developed country, (b) position itself in the 5 biggest global economy, (c) remove itself from the middle-income trap (with a target monthly per capita GDP of IDR 27 million), (d) minimizing poverty level to approach 0%, and (e) producing quality workforce

use of clean energy and water; (c) integrated and evenly distributed infrastructural development throughout the nation; and (d) national security development and restructuring of government administration.

¹⁶ Sri Mulyani, the Minister of Finance, stated that Omnibus Bill is among the various efforts of Indonesia to thrive in transforming its economy, from primary sector (production) to tertiary (value-added manufacturing) sector.

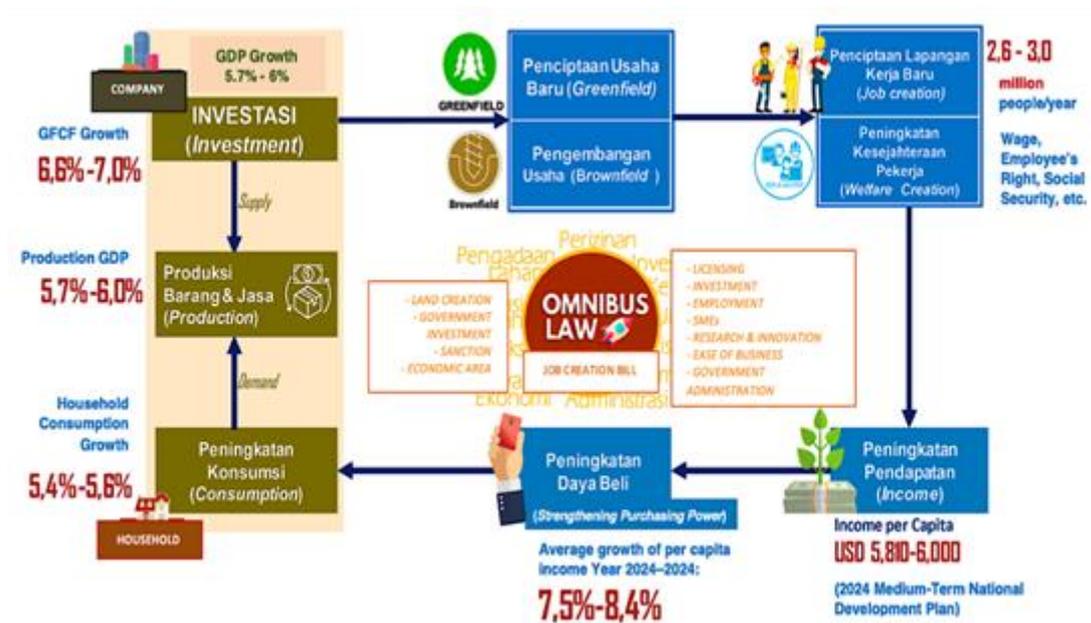


Figure 2. Rationale for Job Creation Bill as One of the Proposed Omnibus Bills.

Source: (figures based on 2024 Medium-Term National Development Plan)

The Government however recognizes the uncertainty and slowing down of global economy, alongside global geopolitical dynamics and technological change marked by digital economy (industry 4.0). Amidst such global challenges, the Government takes into account the following internal conditions of Indonesian economy:

(a) Average economic growth in the last 5 years: $\pm 5\%$, (b) Realization of investment: IDR 721.3 trillion (in 2018), IDR 601.3 T (up to Q3 of 2019), (c) Employment level: 7.05 million people unemployed, 2 – 2.5 million people/year new workforce, 70.49 million people in informal sector (55.72% of the workforce), and (d) monthly per capita GDP: IDR 4.6 million.

To illustrate the impediments faced by the economy, the Government uses the ‘Bucket Illustration’ as follows:

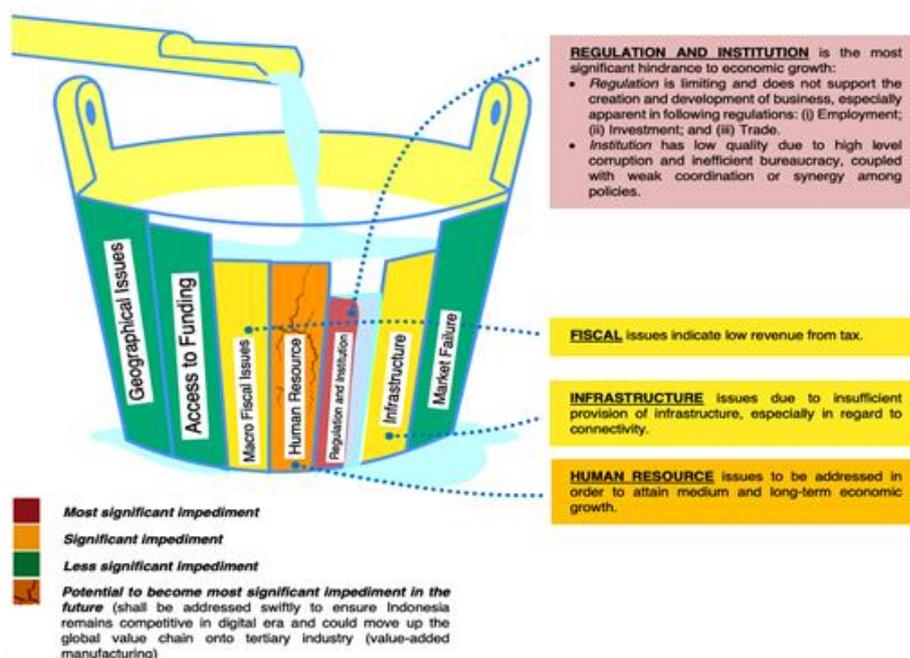


Figure 3. Bucket Illustration of Economic Impediments.

Source: Presentation on Job Creation Bill, Coordinating Ministry for Economic Affairs

As the Bucket Illustration indicates, the Government acknowledges that regulation and institution is the most significant impediment to Indonesia's economic growth. In addition to the abovementioned problem of disharmony between regulatory and administrative tools, the legal system is so overwhelmed with an abundance of laws and legislations to warrant the society a predicate of 'super or hyper regulated society'.¹⁷ To date, the 8,451 central government regulations and 15,965 regional government regulations indicate clearly the complexity and obesity of Indonesia's regulatory framework which could pose practical problems such as difficulties in navigating around the legal system when potential investors are looking to establish businesses in Indonesia. It has been reported that more than USD 120 billion worth of

¹⁷ Jimly Asshiddique, a Constitutional Law expert, referred to Indonesia as a 'super or hyper regulated society' when observing that in the year 2009 alone, there were 826 newly issued laws and legislations. See: Asshiddique, Jimly. "UU Omnibus (Omnibus Law), Penyederhanaan Legislasi, Dan Kodifikasi Administratif." *Jimly School Law and Government*, December 2019, <https://www.jimlyschool.com/baca/34/uu-omnibus-omnibus-law-penyederhanaan-legislasi-dan-kodifikasi-administratif>, accessed on 2 Desember 2019.

capital accumulated in the investment pipeline in Indonesia the past three years failed to materialize due to excessive regulations.¹⁸

Omnibus Law thus becomes a potential alternative to solve the abovementioned problems. As a follow-up to Jokowi's proposal, the Government of Indonesia is proposing four Omnibus Bill out of the 50 bills to be prioritized in the 2020 National Legislation Program (*Program Legislasi Nasional/Prolegnas*), namely Pharmaceutical Bill, Job Creation Bill, Provisions and Tax Facility for Strengthening Economy Bill, and National Capital Bill.¹⁹ To date, only Job Creation Bill²⁰ has been discussed in the House of Representatives (*Dewan Perwakilan Rakyat/DPR*).²¹

Etymologically, the term '*omnibus*' is derived from a Latin word which means 'for all'. In 1819, a Frenchman named Jacques Lafitte combined '*omnibus*' with a French word '*voiture*' (carriage) to refer to a "long-bodied four-wheeled public vehicle for carrying passengers, generally between two fixed stations, the seats being arranged lengthwise, with the entrance at the rear" ('*voiture omnibus*') we now call a 'bus'.²²

¹⁸ Indonesia Investments. "Introducing Omnibus Laws to Standardize and Harmonize Various Sectoral Laws that Burden Indonesia's Investment Environment." *Indonesia-Investments*, January 2020, <https://www.indonesia-investments.com/id/news/todays-headlines/introducing-omnibus-laws-to-standardize-and-harmonize-various-sectoral-laws-that-burden-indonesia-s-investment-environment/item9228>.

¹⁹ Pangestika, Dyaning. "House Lists Priority Bills for 2020." *The Jakarta Post*, January 2020, <https://www.thejakartapost.com/news/2020/01/23/house-lists-priority-bills-for-2020.html>.

²⁰ A bill, supported by the explanatory description and/or academic texts, that is proposed by the President shall be submitted in writing to the Leaders of the House of Representatives by a letter of recommendation from the President, where the name of the appointed minister representing the President is mentioned to discuss the bill with Members of the House (Job Creation Bill is submitted by the Coordinating Ministry of Economic Affairs, Airlangga Hartarto), CNN Indonesia. "Menko Airlangga Serahkan Draf RUU Omnibus Law Ciptaker ke DPR." *CNN Indonesia*, February 2020, <https://www.cnnindonesia.com/ekonomi/20200212152021-92-473960/menko-airlangga-serahkan-draf-ruu-omnibus-law-ciptaker-ke-dpr>, accessed on 20 December 2020.

²¹ House of Representatives. "Program Legislasi Nasional Prioritas.", *DPR RI*, dpr.go.id/uu/prolegnas, accessed on 16 May 2020.

²² Walker, Ruth. "So, Just Where Is This Omnibus Taking Us?." *The Christian Science Monitor*, January 2012, <https://www.csmonitor.com/The-Culture/The-Home-Forum/2012/0103/So-just-where-is-this-omnibus-taking-us>.

Table 1. Omnibus Laws Across Jurisdiction.

No	State	Legal Tradition	Form of State	Sistem Of Governance	Head of State	Head of Governance	Existing Omnibus Law
1	USA	Anglo Saxon	Federal	Presidential	President	President	✓
2	Germany	European Continental	Federal	Parliamentary	President	Prime Minister/ Chancellor	✓
3	Ireland	European Continental	Republic	Presidential	President	President	✓
4	Canada	Anglo saxon	Constitutional Monarch	Parliamentary	King/Queen	Prime Minister	✓
5	Australia	Anglo saxon	Commonwealth /Monarch	Parliamentary	King/Queen	Prime Minister	✓
6	UK	Anglo saxon	Monarch	Parliamentary	King/Queen	Prime Minister	✓
7	Turkey	European Continental	Republic	Parliamentary	President	Prime Minister	✓
8	Philippines	Anglo saxon	Republic	Presidential	President	President assisted by Prime Minister	✓
9	Cambodia	European Continental	Monarch	Parliamentary	King/Queen	Prime Minister	✓
10	Vietnam	European Continental	Socialist Republic	Parliamentary	President	Prime Minister	✓

The analogy of a bus seems to fit perfectly with the concept of Omnibus as a legal term, as an Omnibus Law is “designed to cover many different cases, embracing numerous distinct object”, according to the Compromise of 1850, a package of disparate draft bills approved by the United States’ Congress to put an end to slavery in the new states post Mexican-American War.²³ Despite being prominent in the Common Law legal tradition such as the United States and Canada, the concept of Omnibus Law also appears in Civil Law countries, as can be seen from the following table:

²³ Drexler, Ken. “Compromise of 1850: Primary Documents in American History.” *Library of Congress*, April 2019, <https://guides.loc.gov/compromise-1850>.

For the purpose of understanding Omnibus Law, there are three aspects to be considered across jurisdictions.

2.1 Character: Omnibus Law Covers Multiple Law Across Multiple Sectors

In general, Omnibus Law combines several rules with different regulatory substance, into a single regulation that serves as a *kind* of ‘umbrella act’.²⁴ In Canada, Omnibus Bill was introduced in 1967 by Pierre Trudeau, the Minister of Justice, in the form of Criminal Amendment Bill that amended not only the Criminal Code, but also the Parole Act, the Penitentiary Act, the Prisons and Reformatories Act and to make certain consequential amendments to the Combines Investigation Act, the Customs Tariff and the National Defence Act.²⁵ Omnibus Law is similarly understood in Indonesia as a “format of legislative drafting that is comprehensive, which enact or amend the substance of related laws.” The substance of an Omnibus Law may relate to the (1) Laws and legislations that are directly related to the Omnibus Law, (2) Laws and legislations that are not directly related to the Omnibus Law, and (3) Laws and Legislations that are not related at all to the Omnibus Law, but could overlap or interact with Omnibus Law in practice.²⁶

2.2 Function: Omnibus Law Is Created for a Particular Purpose

According to Canada’s House of Commons Procedure and Practice, an Omnibus Bill “seeks to amend, repeal or enact several Acts and is characterized by the fact that it is made up of a number of related but separate initiatives,”²⁷ as derived from Speaker

²⁴ Makarim & Taira. “Omnibus Draft Bills to be submitted to the House of Representatives.” *The World Law*, December 2019, https://www.theworldlawgroup.com/writable/documents/news/Advisory_2019-December-Omnibus-Draft-Bills-to-be-submitted-to-the-House-of-Representatives.pdf . Note: The use of the term ‘umbrella act’ is still debateable in Indonesia. A growing concern relates to the possibility of Omnibus Law, if treated as an ‘umbrella law’, to eliminate other instrumental regulatory substance from relevant laws that it does not cover.

²⁵ Prober, Jay C. “The Criminal Law Amendment Act 1968–69.” *The British Journal of Criminology*, Vol. 10, No. 2, 1970, pp. 180.

²⁶ Suriadinata, Vincent. “Penyusunan Undang-undang di Bidang Investasi: Kajian Pembentukan Omnibus Law di Indonesia.” *Jurnal Ilmu Hukum Refleksi Hukum*, Vol. 4, No. 1, 2019, pp. 115-132 <https://doi.org/10.24246/jrh.2019.v4.i1.p115-132>.

²⁷ Bosc, Marc & André Gagnon. “Chapter 16: The Legislative Process, House of Commons Procedure and Practice, 3rd Edition, Canada: House of Commons Chambre Des Communes Canada, 2017.”

Gilbert Parent's ruling in the House of Common Debates (1994).²⁸ However, the threshold that recurs throughout discussions on Omnibus Bill relates to 'unifying principle', 'single purpose', 'unifying thread', and 'unitary purpose'.²⁹ There are two main purposes of Omnibus Law: (a) to correct anomalies, errors, inconsistencies, or overlapping of laws and legislations, (b) to have far-reaching impact (practical impact) due to its cohesive and integrated nature.

In 1888, the practice of Omnibus Law existed when a private bill was introduced with the aim of confirming two separate railway agreements in the United States. To date, Omnibus Bill is also consistently used within the United States' legal system with the purpose of creating a comprehensive and far-reaching regulation, for example the Transportation Equity Act for the 21st Century which becomes the most extensive regulation in the country. It is worth noting that the Philippines has also implemented Omnibus Law to regulate the investment sector, by enacting the Omnibus Investment Code of 1987.³⁰ As can be seen from the Code, the Philippines' Government aims to integrate basic laws on investment, clarify and harmonize their provisions, ensuring a cohesive and consolidated investments incentives law to encourage investments.

In Indonesia, there are two implications of Omnibus Law enactment that can be observed, which are (1) Existing Law is still enforceable, except if certain articles (regulatory substance) have been amended or revoked, (2) Existing Law is not enforceable anymore, if the articles (regulatory substance) that has been amended or revoked is the crux of such law.

2.3 Complexity: Omnibus Law Formation Varies According to The Political Will of Law

Parliament of Canada, December 2021, https://www.ourcommons.ca/procedure/procedure-and-practice-3/ch_16-e.html.

²⁸ Parent's Ruling. "Young Offenders 1st Session, 35th Parliament." *House of Commons Debates*, Vol. 133, No. 46, 1994, pp. 2823-2892.

²⁹ Bédard, Michel. "Omnibus Bills: Frequently Asked Questions." *Library for Parliament*, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201279E#txt5.

³⁰ Executive Order No. 226 on the Omnibus Investment Code of 1987.

In Indonesia, a ‘political will of law’ is understood to determine which reform that needs to take place in order to meet the emerging needs within the society.³¹ Corresponding to Black’s Law Dictionary’s definition of Omnibus Law as being “drafted in this way to force the executive either to accept all the unrelated minor provisions or to veto the major provisions”³², it can be understood why the complexity of Omnibus Law varies across jurisdictions based on the underlying political will of law.

In Turkey, for example, the implementation of Omnibus Law through an instrument called *torba kanun* significantly reflects the will of the political party that has the majority in the parliament and causes the exclusion of the others from the law-making process.³³ As a result, *torba kanun* serves the purpose of utility and time efficiency. On the other hand, in the United States’ Congress, the Omnibus Bill requires legislative consensus through a lengthy and more complicated process.

Historically, one of the first instrument of Law that has the character of an Omnibus Law is Law No. 5 of 1960 on Basic Agrarian Principles (Agrarian Law) that was enacted to revoke various unfair and dividing agrarian regulations under the Dutch occupation. The concept of Agrarian Law resembles European Union’s Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 that amends some regulations.³⁴

Conceptually, both the Agrarian Law and Regulation (EU) 2017/239 are aimed to provide legal certainty³⁵ and harmonization of regulations³⁶ within the agrarian sector. In fact, the enactment of Agrarian Law is aimed to remove legal dualism within the Indonesian legal system post-independence.³⁷

³¹ Mahfud, M.D. *Pergulatan Politik dan Hukum di Indonesia*. Yogyakarta, Gama Media, 1999.

³² Garner, Bryan A. *Black’s Law Dictionary*. USA, Thomson West Publishing Co, 2004, p. 175.

³³ Donlan, Sean Patrick & Jane Mair. *Comparative Law: Mixes, Movements, and Metaphors*. UK, Routledge, 2021, p. 51.

³⁴ Regulation (EU) 2017/2393.

³⁵ *Ibid.*

³⁶ Opening Section, Law No. 5 of 1960 on Basic Agrarian Principles.

³⁷ During colonization, legal dualism was apparent due to the existence of European Law and Customary Law. However, the enactment of Agrarian Law as a positive law has already integrated various customary norms (according to Article 5 of Law No. 5 of 1960 on Basic Agrarian Principles), indicating a unification of laws.

Following Agrarian Law, several other laws were enacted that have the character of Omnibus Law, including (a) Law No. 9 of 2017 on the Determination of Governmental Regulation in Lieu of Law (*Peraturan Pemerintah Pengganti Undang-undang/PERPU*) No. 1 of 2017 on Information Access for Taxation Purposes as Law.³⁸ (b) Law No. 23 of 2014 on Regional Government (411 articles length).³⁹

It is to be noted that Omnibus Law has never been explicitly recognized under the Indonesian legal system. However, Indonesia has been constantly challenged by major impediments to establishing conducive investment ecosystem supported by a solid legal system as (a) there are numerous number of laws and legislations, (b) these laws and legislations may be redundant, overlap, or contradict each other, and (c) there are many disharmonies between laws and legislations with existing systems.

Due to such challenges, the proposal to look into Omnibus Law as a concept was eventually mentioned by Sofyan Djalil in 2017, acting as the Coordinating Ministry of Economic Affairs at that time, as a means to solve various regulatory problems encountered by investors.⁴⁰ Various efforts were carried out to initiate legislations of various forms (other than law) with an Omnibus Law character, including the issuance of Decree of People's Consultative Assembly (MPR Decree) No. I/MPR/2003 on the Assessment on Legal Substance and Status of Temporary MPR Decree and MPR Decree of 1960, which regulates on which MPR Decree shall be revoked and deemed unenforceable. However, it is to be noted that so far, the Job Creation Bill has been the most comprehensive multi-sector Omnibus Bill initiated by the Government.

In the United States, Omnibus Law is drafted in the form of Omnibus Bill which operates as an Act, or known as Undang-undang (Law) in Indonesia. In assessing Omnibus Law's position or levelling within the hierarchy of law under the Indonesian legal system, Law No. 12 of 2011 on the Establishment of Laws and Legislations (partially amended by Law No. 15 of 2019) shall be referred to as a guide (Legislative Drafting Law).

³⁸ Coordinating Ministry of Economic Affairs. *Op.Cit.*

³⁹ Redi, Ahmad. *Op.Cit.*

⁴⁰ Arieza, Ulfa. *Op. Cit.*

The hierarchy of law in Indonesia is enshrined under Article 7 of Legislative Drafting Law as follows:

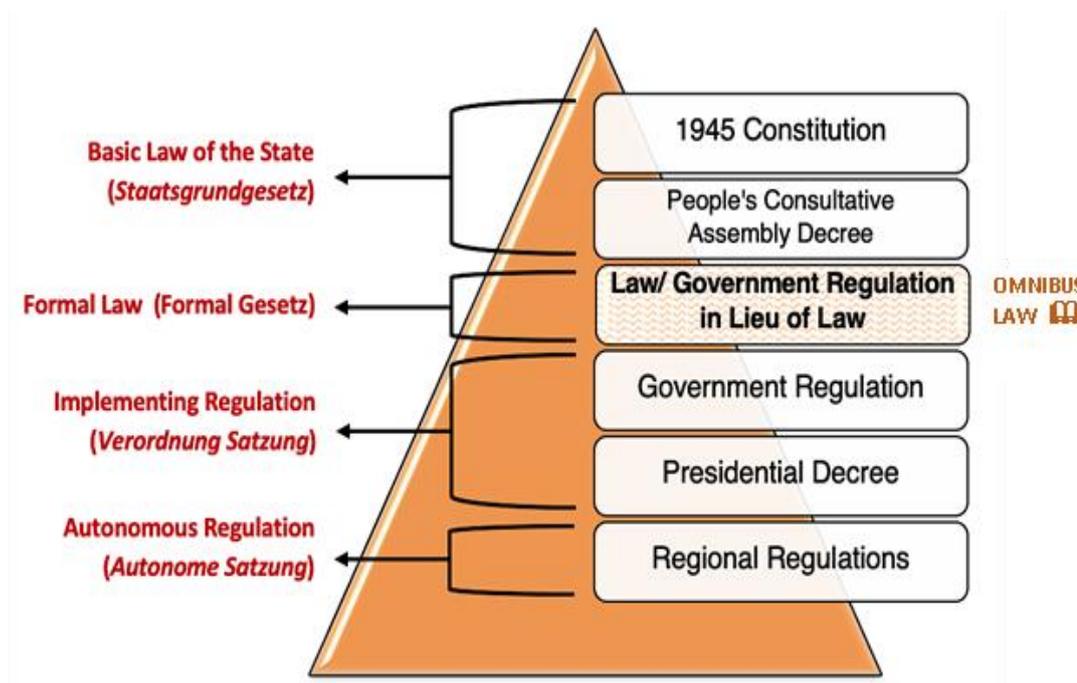


Figure 4. Hierarchy of Law According to Article 7 of Law No. 12 of 2011 on the Establishment of Laws and Legislations.

In the implementation of laws and legislation, Hans Kelsen's postulated the Theory on Hierarchy of Legal Order ("Stufenbau Theory"), which is highly applicable in Indonesia:

"The legal order [...] is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different level of norms. The unity of these norms is constituted by the fact that the creation of the norm – the lower one – is determined by another – the higher – the creation of which is determined by a still higher norm, and that this regressus is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity".

The Stufenbau Theory was developed subsequently by Hans Nawiasky through theory von stufenbau der rechtsordnung which coupled the levelling of legal norms with the categorization of such norms into (a) State Fundamental Norms (*staatsfundamentalnorm*), (b) State Ground Norm (*staatsgrundgesetz*), (c) Formal Law

(*formalle gesetz*), and (d) Implementing and autonomous Regulations (*verordnung en outonome satzung*).

Accordingly, as can be seen in Figure 4, the Constitution of the Republic of Indonesia enacted in 1945 post-independence (1945 Constitution) coupled with MPR Decree, both as ground norms, contain basic prescriptions for further law-making. The Law and Government Regulation will be enacted to further regulate and crystallise the norms into specific enforceable set of rules. In practice, Government Regulations and Presidential Decrees as *lex specialis* prescribe more detailed rule for implementation.

Therefore, despite the lack of explicit discussion on where the Omnibus Law stands within the hierarchy of law in Indonesia, it is clear that Omnibus Law is treated as follows (a) Omnibus Law shall function as Formal Law (*formalle gesetz*), which is the highest form of norm under the 1945 Constitution and as mandated by MPR Decree. Therefore, the content of Omnibus Law must not contradict the 1945 Constitution in any way, (b) Omnibus Law is not a codification of law. Instead, a process of Omnibus Law formulation shall amend and revoke relevant other laws and legislations to serve a particular purpose.

After establishing that Omnibus Law shall be treated as a Law (*undang-undang*), it is pertinent to look into the legislative process required to come up with such law. Article 20 (1) of the 1945 Constitution grants the law-making authority (legislative function) to the legislative branch of government, namely DPR. In drafting legislations, DPR shall discuss law at hand with the President, in consideration of the wording of the law and accompanying academic texts, to eventually reach a consensus.

As explained previously, to date, the only Omnibus Bill that has undergone thorough discussion in DPR is Job Creation Bill according to the following timeline:

Table 2. Timeline of Job Creation Bill Legislative Drafting.

Academic Text Draft of Job Creation Bill

Substance	Approval of substance material of draft bill	January 15, 2020
Formulation of Academic Text	<ul style="list-style-type: none"> Ministry of Law and Human Rights finalized the Academic Text. Issuance of Ministry of Law and Human Rights Letter No. PHN-HN.02.04-04 dated January 20, 2020. 	January 20, 2020
Harmonization Of Draft Bill	<ul style="list-style-type: none"> Ministry of Law and Human Rights finalized harmonization of draft bill Issuance of Ministry of Law and Human Rights Letter No. PPE.PP.03.02-107 dated January 20, 2020 	January 20, 2020
2020 Priority National Legislative Program	Plenary Meeting of DPR to include draft bill within the 2020 Priority National Legislative Program	January 22, 2020
President Letter and Appointment of Government Representative	<ul style="list-style-type: none"> Issuance of President Letter to DPR Head No.R-06/Pres/02/2020 on Submission of Job Creation Bit Issuance of Ministry of State Secretariat No. B-105/M.Sesneg/D-1/HK.00.02/02/2020 on Appointment of Government Representative in Job Creation Bill Discussion 	February 7, 2020

The drafting of Job Creation Bill is given exclusively to Government Task Force (Government Representative) in cooperation with the Indonesian Chamber of Commerce and Industry, based on the Decision of Coordinating Minister of Economic Affairs No. 378 of 2019 on Joint Task Force Between the Government and Chamber of Commerce for Omnibus Law Public Consultation. According to Article 4 of the said decision, in carrying out its duty, the Task Force may involve ministries/non-ministerial government institutions, regional government, stakeholders, academics and other relevant parties. However, in reality there were many stakeholders left out from the public consultation of Omnibus Law. This sparked many protests throughout the country, including from labourers as their aspirations is not accommodated in the

formulation and enactment of Job Creation Bill, as will be further elaborated in the next section.

3. Constitutionality of Omnibus Law

In discussing the problems and controversies surrounding Omnibus Law in Indonesia, the discussion of Job Creation Bill as the *only* major bill under review and public scrutiny during its formulation, is indeed inevitable. In a nutshell, the draft of Job Creation Bill (comprising 15 Chapters and 174 Articles) aims to cover (amend or revoke) 75 relevant laws to, among others:⁴¹

- 1) focus on:
 - (a) increasing the ease of doing business in Indonesia by creating a conducive investment ecosystem (for example by simplifying licensing processes in 18 sectors, simplifying land acquisition processes, introducing specific provisions on economic zones, creating a land bank supervisory authority, and removing several local filings and registrations such as disturbance permits (*izin gangguan*) and company registrations (*wajib daftar perusahaan*));
 - (b) increasing support and protection for SMEs (for example through provision of single database, collaborative processing, increased ease of single permit, and more flexible partnership, incentive, and funding); and centralizing the government's investment activity (for example creating a government investment authority and fund);
 - (c) introduce key amendments including simplification of licensing to several sectors, notably trade, mining, forestry, mining, plantation, construction, education, transportation (including sea transportation), postal services and broadcasting services;
- 2) introduce several key amendments to the Labour Law, particularly on expatriate licensing requirements, employment termination, contract-based employment, post-termination benefit schemes, employees' rights when there is an acquisition, and severance pay/termination pay;

⁴¹ Coordinating Ministry of Economic Affairs. *Op.Cit.*

- 3) reiterate that Investment Law and Presidential Regulation No. 44 of 2016 on List of Business Fields that are Closed to and Business Fields that are Open with Conditions to Investment (“Negative Investment List”) will be the main reference for all capital investment activities in Indonesia;
- 4) provide umbrella provisions for the central government to grant tax and fiscal incentives to specific sectors, particularly the tourism sector; and
- 5) confirm that all licensing processes will be undertaken by the central government, rather than being allocated between the central government and local governments.⁴²

The Government claims that these revisions are necessary to change the investment climate in order to benefit Indonesian economy. However, it is believed that in a democratic state of law such as Indonesia, a law or legislation shall not contain any errors both in substantive aspect and procedural aspect (substantive due process of law and procedural due process of law).

As can be seen from the timeline of Job Creation Bill drafting, the finalizations of draft bill and academic text were carried out within less than a month. In fact, Jokowi has targeted that Job Creation Bill shall be finalized within 100 days.⁴³ Taking into account that Indonesia has never come up with such a comprehensive Omnibus Law, coupled with the short deadline of legislative drafting, several procedural and substantive problems have been highlighted constantly by various legal experts and stakeholders.

There are two major procedural problems that are observable from the legislative drafting of Job Creation Bill.

First, the drafting of Job Creation Bill is claimed to have violated the principle of openness⁴⁴ enshrined in the Legislative Drafting Law. Government is required to disseminate relevant information on the draft bill right from the moment of National

⁴² Djajadiredja, Mita & Daniel Pardede. “Indonesia: The Government Delivers Long Awaited Draft Omnibus Law to Parliament.” *Global Compliance News*, March 2020, <https://globalcompliancenews.com/indonesia-the-government-delivers-long-awaited-draft-omnibus-law-to-parliament/>.

⁴³ Maharani, Tsarina. “Jokowi Targetkan "Omnibus Law" Cipta Lapangan Kerja Selesai dalam 100 Hari.” *Nasional Kompas.com*, January 2020, <https://nasional.kompas.com/read/2020/01/15/14424401/jokowi-targetkan-omnibus-law-cipta-lapangan-kerja-selesai-dalam-100-hari>.

⁴⁴ Article 5, Law No. 12 of 2011 on Establishment of Laws and Legislations.

Legislation Program planning, drafting of the bill, public consultation of the draft bill, up to enactment of said bill.⁴⁵ However, the draft of Job Creation Bill could only be accessed by the public after the draft bill has been completed and submitted to DPR. In fact, the public had difficulties in accessing both the draft bill and academic texts as these documents were not made readily accessible in any government platform.⁴⁶ Due to this procedural neglect, Job Creation Bill has been rejected outright by academics, including the 92 academics who signed a joint petition to reject said bill.⁴⁷

Second, the alleged vested interest within Job Creation Bill indicates that said bill does not balance existing interests in the society. The drafting of Job Creation Bill, as has mentioned in earlier section, was given exclusively to Government Task Force Indonesia focuses on the mandate of the Constitution that the state has to establish economic independency and thus, prioritize its national interest and ensure that all the investment treaties are in accordance with the applicable laws and regulations. In other words, the Government should aim to strike a balance between the protection of investors and national interest.

The first source of law that must be taken into account is the 1945 Constitution as the ground norm, followed by the existing laws. Article 33 of the 1945 Constitution, plays a major role in determining Government's direction in determining policies:

(1) The economy shall be organized as a common endeavour based upon the principles of the family system. (2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State. (3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people. (3) The organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the

⁴⁵ Article 88, *Ibid*.

⁴⁶ CNN Indonesia. "Akademisi Nilai RUU Ciptaker Langgar Asas Keterbukaan." *CNN Indonesia*, April 2020, <https://www.cnnindonesia.com/nasional/20200422202527-32-496299/akademisi-nilai-ruu-ciptaker-langgar-asas-keterbukaan>.

⁴⁷ Maharani, Tsarina. "92 Akademisi Teken Petisi Tolak Omnibus Law RUU Cipta Kerja." *Kompas.com* April 2020, <https://nasional.kompas.com/read/2020/04/22/17222001/92-akademisi-teken-petisi-tolak-omnibus-law-ruu-cipta-kerja>.

national economy. (5) Further provisions relating to the implementation of this article shall be regulated by law.

Prioritization to national interest as enshrined in Article 33 of the 1945 Constitution is an underlying spirit commonly found in various laws and legislations in Indonesia, such as the Agrarian Law, which is based on customary law that sides with indigenous population;⁴⁸ Labour Law, which serves to revolutionize legal protection for workers;⁴⁹ and ultimately Investment Law, which focuses on improving national economy for the welfare of Indonesian people.⁵⁰

However, Job Creation Bill has been claimed to violate such a spirit of national welfare and consequently, the values and purposes upon which relevant pieces of legislations are created. The Consortium for Agrarian Reform (*Konsorsium Pembaruan Agraria*) submits that there are various problems found within the Job Creation Bill that reflects blatant violation of the 1945 Constitution and conflict with other laws and legislations: (1) Job Creation Bill consists of certain controversial clauses that has been previously rejected in the formation of relevant laws, (2) Job Creation Bill will aggravate land disputes and side with large-scale investors, (3) Forcible expropriation of land for business will become easier and in turn, will marginalize further the medium-low income land-owners, and (3) As a result, there may be increased criminalization of small farmers or citizens who have been living off forest areas if such areas are to be acquired for investment purposes.

Taken as a whole, Job Creation Bill is clearly against the spirit of Agrarian Law which is significantly based on customary law and aimed at prioritizing national interest.

In consideration of the above problems, there have been waves of rejection towards the idea of proposed Omnibus Law. Coupled with increased pressure to deal with the COVID-19 pandemic, including the resulting slowing down of the economy, the Government will likely take some time until the discussion on Omnibus Law resume.

⁴⁸ Article 5, Law No. 5 of 1960 on Basic Agrarian Principles.

⁴⁹ Law No. 13 of 2003 on Employment.

⁵⁰ Consideration, Law No. 25 of 2007 on Investment.

Post-enactment, the Job Creation Law continued to meet various resistance, its effectiveness being questioned and constantly scrutinized. The peak of its scrutiny came in the form of Decision of the Constitutional Court No. 91/PUU-XVIII/2020 in relation to the constitutional review of the Job Creation Law.

This Decision essentially points out that the Job Creation Law is against the 1945 Constitution that the Law is rendered unconstitutional and to be revised in a period of 2 years. Should no revision be made to the Law, it will be rendered permanently unconstitutional. Indeed, this Decision came after thorough consideration of the Constitutional Court that the formulation of the Law has been tainted with both procedural and substantive flaws as explained in this Research.

In essence, the lack of stakeholders participation becomes the determining flaws of the Law, which is against the principle of openness or transparency, essential to the formulation of laws and legislations.

Law development in which the preparation of a legal system is carried out in accordance with changes in society which do not only question the legal structure but also the legal culture of the community itself,⁵¹ and legal politics. Legal politics of omnibus law stems from the political will with the legal method for all. This is intended to simplify regulations and deregulate regulations that hinder job creation and empower micro, small and medium enterprises (hereinafter UMKM) through an omnibus law in the form of the Job Creation Law. The existence of political will from President Jokowi to make the Job Creation Law as an omnibus law is the beginning of the planning stage. This is a form of omnibus law transplantation in the formation of legislation in Indonesia.⁵²

The legal politics of the formal and material of the job creation law is still dynamic since the political will to form a job creation law and empower UMKM by implementing the omnibus law. The direction of legal politics is the creation of a new

⁵¹Harjono, Dhaniswara K. "Konsep Pembangunan Hukum dan Perannya Terhadap Sistem Pasar." *Jurnal Hukum*, Vol. 18, No. 4, 2011, pp. 151-161.

⁵² Kartika, Shanti Dwi. "Politik Hukum Undang-Undang Cipta Kerja, Info Singkat Vol. XII." *DPR RI*, November 2020, http://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-XII-20-II-P3DI-Oktober-2020-210.pdf, p. 5.

law in omnibus law form in the context of creating job opportunities.⁵³ Legal politics (legal policy) will be a bridge to form operational regulations (law in the broadest sense) in accordance with the spirit of Indonesian legal ideals. Legal politics also helps investigate changes so that the law is in accordance with *werkelijkheid* (social reality), which is the *ius constituendum* that determines the new *ius constitutum*.⁵⁴

Job Creation was agreed to be one of the bills in the 2020-2024 National Legislation Program (*Prolegnas*) and the 2020 Priority Bill. This means that there has been an agreement between the DPR RI, DPD RI, and the President to make the bill a national legal development agenda, to overcome problems regulations, creating jobs, and empowering UMKM. This is a concrete manifestation of the implementation of national legal politics, although the government is not ready with the draft and academic text for the Job Creation Bill. The technocratic drafting stage, which was then submitted to the DPR RI through Presidential Letter No. R-06/Pres/02/2020 dated February 7, 2020. This means that there is a formal legal political shift in the formation of the Job Creation Law to be discussed by the legislative body. The planning and drafting stages are considered to have had a formal defect. The absence of a draft bill and an academic text does not meet the prerequisites of a bill in the National Legislation Program and Priority Bill. The government is considered to have never provided public access to provide input on the bill. This is contrary to the principles of participation and openness as stipulated in Law No. 14 of 2008 concerning Disclosure of Public Information and Law No. 12 of 2011 concerning the Establishment of Legislation as amended by Law no. 15 of 2019.⁵⁵

Legislation is an important instrument in the rule of law, to ensure order in the administration of the state. The formation of this legislation cannot be separated from Pancasila and the 1945 Constitution of the Republic of Indonesia as the highest source of law. Legislation as a public policy has constitutional indicators as justification, namely the Preamble to the 1945 Constitution of the Republic of Indonesia which contains Pancasila as the nation's view of life as well as the goals of the state and state

⁵³Pardede, Marulak. *Omnibus Law dalam Grand Design Sistem Hukum Indonesia*. Jakarta, Papas Sinar Sinanti, 2021, pp. 228-229.

⁵⁴ Agusmidah. *Filosofi, Karakteristik & Politik Hukum Ketenagakerjaan/Hukum Perburuhan*. Workshop bagi dosen hukum ketenagakerjaan first session, 20 March 2021.

⁵⁵ Kartika, Shanti Dwi. *Loc. Cit.*

functions and norms in the body of the 1945 Constitution of the Republic of Indonesia. This constitutional indicator is a pressing point of material legal politics which should be reflected in the material content of laws and regulations. The Job Creation Law has a constitutional basis for promoting public welfare as stipulated in the Preamble to the 1945 Constitution of the Republic of Indonesia. In addition, it is also based on Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, relating to human rights to work and a decent living for humanity. For this reason, the government is obliged to fulfill the rights to work of its citizens.

The Indonesian Parliament passed a massive bill titled Job Creation on October 6, 2020. As part of the Job Creation Bill, two laws were repealed and 82 others were amended. As a result, at 1187 pages, this is the longest piece of legislation that the Indonesian Parliament has ever passed. The act's spirit, which centres job creation, guarantees the nation's stability and economic justice.⁵⁶

Despite still being under discussion, the Job Creation Draft Omnibus Law provides an idea of how the Government of Indonesia intends to implement the concept of an Omnibus Law in Indonesia. The draft law has sparked a debate across the country in regard to various issues, including, but not limited to, the topic of interest of this Paper, namely the constitutionality of such law. It is also essential to assess how Indonesia's legal system understands the *Omnibus Law* as a concept. Despite not being a novel concept, the Omnibus Law has scarcely been implemented globally and is commonly perceived as a Common Law (Anglo Saxon) legal concept requiring careful and thorough consideration for it to be transplanted into the Civil Law (Continental European) legal tradition of Indonesia.

III. CONCLUSION

As has been discussed above, taken as a whole, Omnibus Law is primarily aimed to increase investment in Indonesia, providing various improvements in ease of establishing businesses and economic cooperation, but especially still guaranteeing the

⁵⁶ Arifin, Saru. "Illiberal Tendencies in Indonesian Legislation: The Case of The Omnibus Law on Job Creation." *The Theory and Practice of Legislation 2021*, pp. 386-403, <https://doi.org/10.1080/20508840.2021.1942374>.

welfare of all citizens in practice. However, there are various procedural and substantive problems that need to be tackled by the Government before full implementation of the law. It is yet to be clear how the Government will respond to the wave of rejections towards the Omnibus Law initiative and eventually come up with a balanced set of laws and legislation that will guarantee both national interest and protection for investors, especially within the two years given to revise the Law. Reservations shall be made to this Research impending the upcoming revision of the Job Creation Law by the Government. Should the Law be eventually amended, further research and findings could be reported as an alteration to the current Research.

ACKNOWLEDGMENT

This research is fully funded by Lembaga Penelitian dan Pengabdian kepada Masyarakat Universitas Pelita Harapan on 2021.

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