



## The Making of Law Non-Participatory and Its Impact on Democracy

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### Abstract

The formation of laws in Indonesia today, both formally and materially, is still prone to deviations (controversy) by not involving public participation and not being open. This will result in problems in the form of legislative corruption, buying and selling articles, law products with weak legitimacy to Judicial Review. Public participation in the process of forming laws is an important element, because laws that are formed in a participatory manner are in line with democratic rule of law and meet the legal needs of society. Democracy. The focus of the study and analysis carried out in this research is related to the formation of an omnibus law (Cipta Kerja) which is considered undemocratic so that it poses a danger (legal consequences) and various responses from the community ranging from community rejection, students to workers who hold demonstrations. (demo) in various regions, then the submission of a judicial review at the constitutional court, then the inclusion of bills that are not important into the national legislation program and the existence of corruption in legislation in the law-making stage. This research is a normative legal research that aims to find solutions to legal issues and problems that arise in Indonesia in it, so that the results to be achieved then provide a prescription on what should be on the issues raised. The approach used is the law approach and the concept approach. The results of this study show that the process of forming the Omnibus law (Cipta Kerja) is full of interests, in this case the Government, DPR to Entrepreneurs so that it is not transparent (closed) and the lack of public participation which results in violations of democratic values and the constitution.

**Keywords:** Formation of Laws, Not Participatory, Democracy

### Introduction

Indonesia is a country based on the rule of law (nomocracy) and people's sovereignty (democracy). This is as stated in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states "Sovereignty is in the hands of the people and is carried out according to the Constitution". The consequence of the commitment above is that all activities of the government and the people must be based on the law and the people have a role in every aspect of the life of the

and state, one of which is involvement in the process of forming the law (Astomo, 2018). The idea of Indonesia as a state of law is an idea that needs to turn ideal thoughts into reality in the long term (Korslak, 2014). The definition of a rule of law, according to Jimly Ashiddiqie, tends to be closely related to the separation of powers (the concept of separation of powers) and the protection of basic rights (Ashiddiqie, 2020).

In connection with the formation of democratic laws, it contains two meanings, namely process and substance. The process is a mechanism in the formation of laws that must be carried out transparently so that the community can participate in providing input in regulating an issue. In other words, emphasizing the role of society in the formation of laws (Hayward, 2015). While the substance is the material to be regulated must be intended for the benefit of the wider community so as to produce a democratic law (Saifuddin, 2009). Thus, between participation, transparency and democratization in the formation of laws is a unified whole and cannot be separated in a democratic country.

In this regard, the law has a central position and can even become the main legal product in the national legal system. This is based on four arguments, namely: first, the law is one of the three legal products listed in the 1945 Constitution of the Republic of Indonesia made by an authorized state institution or official and is generally binding which contains elements philosophical, juridical and sociological and its contents can be accepted by the public (Rahmasari, 2016). Another legal product is a Government Regulation (PP) which was formed to implement laws and Government Regulations in Lieu of Law (Perppu). Second, the law is directly in the hands of under the 1945 Constitution of the Republic of Indonesia as the supreme law.

The 1945 Constitution of the Republic of Indonesia provides delegates with further regulation on various matters with the law. Third, law is a legal product that is made democratically as an implementation of the principle a democratic rule of law. Law is shaped by institutions. There is no democracy, namely the DPR and the President who are elected through general elections. Fourth, the substance of the Act is the interpretation of the 1945 Constitution of the Republic of Indonesia by the DPR and the President and then a mutual agreement is obtained to be ratified by the president (Assiddiqie, 2010). The interpretation of the 1945 Constitution in the form of a law is more dominant when compared to the interpretation used. Carried out by a negative passive MK (Safa'at, 2020).

Because law has a very important role in the legal system, there are various interests that can conflict, both from individuals and groups in society and the government in the process of formation and change so that their interests can be accommodated in the law. As a result of these various interests, a law that is formed or amended can cause problems that give birth to massive social delegitimacy in society. This reality can be seen from the formation of the *Omnibus Law* (UU Cipta Kerja) which was formed undemocratically so that there was a lack of public

participation. Criticism of the formation of the *Omnibus Law* (UU Cipta Kerja) seems to have been ignored by the government, which tends to favor certain parties, especially the dominant elite (Akbar, 2021).

Another problem is whether the procedure for establishing the *Omnibus Law* (UU Cipta Kerja) is appropriate or not in accordance with the procedures stipulated in Law Number 12 of 2011 Juncto Law Number 15 of 2019 concerning the Establishment of Legislations (UU P3), so it is considered undemocratic and does not have consistency between the announced rules and their implementation in reality (Redi, 2018).

Based on the facts above, there are several things that will be analyzed, namely the legal consequences of the formation of undemocratic laws and their impact on democracy. The focus of the study in this research is the formation of the *Omnibus Law* (Cipta Kerja) which is considered undemocratic in its formation, so that the problems that become the focus of this research are: (1) what are the legal consequences of the formation of undemocratic laws, especially in the formation of the *Omnibus Law* (Creation of Work) law? and what is the danger (impact) of the *Omnibus Law* (Cipta Kerja) on democracy in Indonesia.?

## **Methods**

Research is a normative legal research that aims to find solutions to legal issues and problems that arise in Indonesia in it, so that the results to be achieved then provide a prescription on what should be on the issues raised. The approach used is statute approach and a concept approach to examine the problems to be studied (Marzuki, 2008).

## **Discussion and Result**

### **Legal Consequences Caused Against the Establishment Non-Democratic Laws**

Historically, drafting laws using the *Omnibus Law* is not something completely new. But this concept is also applied in the Election Law, basically uniting and revising 6 (six) laws at once (Putra, 2020). However, in the formation of the *Omnibus Law* (Cipta Kerja) reaping the pros and cons in the community. The DPR and the Government formed the *Omnibus Law* on the grounds that (1) the *Omnibus Law* is a new concept used in the Indonesian legal system and (2) it will bring happiness and reduce people's suffering. However, the government's reasons do not affect people's lives and actually benefit entrepreneurs. In addition, the mechanism for the formation of the Job Creation Law is considered to have closed indications because it does not involve the community at the stage of preparation by the government which causes dynamics in the formation of the Job Creation Bill, both formally and materially (Kartika, 2020).

Other points that are in the spotlight of the community, especially the labor or worker groups include, the Minimum Wage is based on the Provincial Minimum Wage (UMP), In Article 95 there is no fine for employers who are late in paying wages to workers who are laid off because of the third warning letter. receive severance pay, workers who are laid off due to a change in status, merger, consolidation, or change in company ownership do not receive severance pay, workers who are laid off because the company suffers a loss for two years or circumstances force them to not receive severance pay, workers who are laid off due to entering retirement age severance pay is no longer given, workers who are laid off due to prolonged illness or when they experience a disability due to a work accident no longer receive severance pay, free contract work in all types of work, *outsourcing* is free to use in all types of work and there is no time limit (Hesti Kartika, 2021, p.44).

Based on the points above, this resulted in: (1) public rejection (demonstration), (2) demands for *judicial review* at the Constitutional Court, (3) the existence of non-urgent drafts into the national legislation program and (4) there is corruption in legislation in the stages of law formation.

### **Public Rejection (Demonstration)**

The presence of the Omnibus Law has received many responses from the public, because the presence of the law is expected to solve problems but instead creates new social problems in society. The formation of the law is also considered to be influenced by political interests so that the results are concerned with certain groups (Ramadhan, 2019). Furthermore, the public's response can be in the form of support or rejection of the birth of a new law which is realized through demonstrations. This demonstration is one form of democracy in the process of forming laws, especially demonstrations that reject it because it will encourage improvements or replacements with better laws. The rejection of the presence of a new law in the midst of society is also a result of the formation of a law that is considered undemocratic (controversial) so that it creates public dissatisfaction in accepting the presence of a law (Siti Hidayatai, 2019).

The demonstrations carried out by the community, especially workers, were caused because the Omnibus Law on Job Creation was considered more in favor of the company as the owner of the means of production. This will create a class gap between the enterprise as the bourgeoisie and the workers as the proletariat. Companies will try to reap as much profit as possible and that can be obtained from surplus value (profits derived from excess hours by workers. In addition, the Omnibus Law which seeks to attract foreign investors also causes alienation. Money as a sign of human alienation places investors in as anyone who can get anything and can take on many roles in the economy, while workers who are powerless in terms of

money will not have much impact on economic activities because workers do not have the potential to make a lot of money (Salahudin, 2020).

From this it can be seen that the public is not satisfied with the results of the hearing on the ratification of the job creation bill, the community considers that the law is not in favor of civilians. In other words, the formation of laws is not only limited to legal regulations and their application but also the legal consequences that occur in society (Rahardjo, 2006). Because the formation of a law is the obligation of the DPR and the government whose substance must be pro to the people (Alan R. Ball & Guy Peters, 2005). Therefore, the community took a series of actions to reject it. The community wants the government not to ratify the bill into a law that will later be enacted. The dynamics that occur, demonstrations, and actions as the realm of aspirations are not used as the basis for the DPR as people's representatives who have been elected on the basis that DPR members fulfill the representation factor and represent the interests of the people (Fahmi, 2011). Jeremy Betham in the flow of utilitarianism that humans act to increase happiness and reduce suffering. Through the law embodied in the Act, it is hoped that the dream of happiness can be achieved. In essence, laws were created to obtain goodness, peace, and order in life so that the formation of laws must aim at the national good, not at the good of a particular group (Sony Maulana, 2005).

### **Demand for *Judicial Review* at the Constitutional Court**

The ratification of the Job Creation Bill into Law No. 11 of 2020 concerning Job Creation, which until the issuance of the Constitutional Court Decision No. 91/PUU-XVIII/2020 regarding the constitutionality of the Job Creation Law is still a polemic. In one of its rulings, the Constitutional Court stated that the Job Creation Law was considered formally flawed and conditionally unconstitutional by specifying several implications for the enactment of the law because the process of its formation lacked public participation.

In the judicial review of the Job Creation Law by the Constitutional Court which has been decided in relation to the Formal Examination of the Job Creation Law, there are interesting things related to the Formal Examination of a Law against the 1945 Constitution. In its decision, the Court cited:

That in addition to the fulfillment of the formalities of all the stages above, another problem that must be considered and fulfilled in the formation of the law is public participation. The opportunity for the community to participate in the formation of laws is actually a fulfillment of the constitutional mandate which places the principle of people's sovereignty as one of the main pillars of the state as stated in Article 1 paragraph (2) of the 1945 Constitution. Furthermore, public participation is also guaranteed as rights. constitutional rights based on Article 27 paragraph (1) and Article 28C paragraph (2) of the

1945 Constitution which provide opportunities for citizens to participate in government and build society, nation and state. If the formation of laws with processes and mechanisms that actually closes or distances the involvement of community participation to participate in discussing and debating its contents, it can be said that the formation of laws violates the principle of *people's sovereignty*.

Furthermore, in considering the Constitutional Court's Decision No. 91/PUU-XVIII/2020 the Court gave an explanation of *meaningful participation*. "Based on the legal basis that has been established, Law 11/2020 *a quo* has been revised in order to comply with definite, standard and standard methods or methods, as well as the fulfillment of the principles of law formation, as mandated by Law 12/2011, particularly with regard to the principle of transparency. Must include maximum and more meaningful public participation, which is the embodiment of the constitutional order in Article 22A of the 1945 Constitution.

Meaningful public participation is an effort to seriously involve community groups with interests and expertise in the process of forming laws and regulations (Nurhasan, 2022). In order to strengthen the substance of norms and institutions as an instrument to realize the stated goals. The component that must exist is the provision of access to the community to be involved in the process of establishing a democratic law. So that a responsive and prismatic law is created. Subjects and materials for participation consist of groups with an interest in the substance of the laws and regulations that have been formed. In addition, experts in the field of legal substance are formed according to scientific competence. Furthermore, the participation mechanism is carried out through the dissemination of plans, academic texts, and designs to the subject of participation through various media and methods.

The procedure for the formation of Law 11/2020 does not meet the principles of clarity of purpose and the principle of clarity of formulation (Firman Soebagyo, 2021). Because the norms of Article 5 letter a, letter e, letter f and letter g of Law 12/2011 require the fulfillment of all principles cumulatively, then with the failure to fulfill only one principle, Article 5 of Law 12/2011 is neglected by the process of forming Law 11/ 2020. After the issuance of the Constitutional Court's decision, it can contribute to fixing the system of forming laws and regulations. At the same time, it is a reminder that lawmakers must always obey the principles in every process of forming laws in the future, especially the principle of openness which is realized through more meaningful public participation.

### **The existence of a draft law that is not important to enter the national legislation program**

In every drafting or planning of laws, it is carried out in the National Legislation Program, this is as stipulated in Law No. 12 of 2011. Furthermore, Article

17 explains that the National Legislation Program is a priority scale for the Law Formation program in the context of realizing a national legal system. Based on the article, it can be seen that the position of Prolegnas is important as one of the efforts for the formation of a planned draft law, so that it can support the realization of a better national legal system.

In almost every period of the DPR RI, the performance of legislation always gets a red report card by the public, one of the indicators is the non-achievement of the targets of the National Legislation Program, both Priority Prolegnas and the medium term. The number of Prolegnas for the 2009-2014 period reached 247 bills (Fahmi Ramadhan, 2021). However, until the end of that period, overall, the DPR had approved 125 bills to be passed into laws. The total percentage approved only reached 45 percent of the target.

Prolegnas is expressly regulated by law in Law no. 10 of 2004 concerning the Establishment of Legislation. It has been 15 years since Prolegnas has been practiced, but it has never reached the target that has been set. The first time the Prolegnas was enacted in the 2004-2009 period, only 60% of the laws were passed out of the 284 proposed bills. The following period 2009-2014, fell to 51% of the 247 proposed bills. In the 2014-2020 period, the number of laws passed has decreased to 48% of the 189 proposed bills. So, during the three periods the National Legislation Program was implemented, the DPR and the government always failed to achieve the target (Andi Irman Putra, 2008). Even today, in practice, the DPR and the Government often pass or discuss laws that were not previously included in the Prolegnas list (Nur Sholikin, 2001).

The inclusion of a bill that does not have an urgency of interest especially to the public into the National Legislation Program and/or the abolition of a bill that is needed by the public from the National Legislation Program, if we interpret it broadly, it can be said as a form of legislative corruption, because there are efforts by certain groups to do something in this case include the bill that benefit certain groups and are considered to be detrimental to the wider community. This often happens in the annual priority Prolegnas which changes frequently. For example, in 2015, the DPR and the Government agreed on two new draft laws, namely the Tax Amnesty Bill, and the KPK Law Amendment Bill which was included in the 2015 Priority Prolegnas, at the DPR Plenary Meeting on 15 December 2015 (Republika, 2021). This is of course very odd, considering that it was carried out at the end of 2015, even the DPR will go into recess on December 18, 2015. Thus, it is very unlikely that the two Draft Laws can be discussed in 2015.

### **Legislation Corruption in the Stages of Legislation**

Corruption and power are like two sides of a coin. Corruption goes hand in hand with power and power is the entrance for corruption (Arsyad Sanusi, 2009). The

discussion of the bill is carried out by the DPR together with the President represented by the appointed minister. The discussion of the bill passes through 2 (two) levels of discussion, namely level I discussions in commission meetings, joint commission meetings, legislative body meetings, budget board meetings, or special committee meetings, and level II discussions in plenary meetings.

The problem in the discussion process that arose was that the Academic Papers were not discussed as an inseparable part, so far the discussion was only on the aspects of the Bill (substance) where the interaction between the government and the DPR was outlined through the Problem Inventory List. The List of Inventory Problems only discusses the material and formulation of chapter titles, paragraph titles, section titles, articles or paragraphs, so that the arguments and analysis constructed and the results of the study of the reality of the problems contained in academic texts are never tested or discussed.

The partial discussion of the bill is quite vulnerable to intervention of interests that can have a negative impact on the public. Namely, interest groups who have material or capital that have access to power can quite easily enter certain "orders" that are in accordance with their interests or revise provisions that are more in the form of exclusivity and/or relaxation (Agus Riwanto, 2016).

### **The Danger (Impact) of the Omnibus Law (Cipta Kerja) on Democracy in Indonesia**

President Joko Widodo's desire to cut regulations in the economic and investment sectors through an omnibus law approach, or revoke many regulations with one law, has recently been followed by many ministries, institutions, and commissions in the House of Representatives. The plan, the idea is also used to cut regulations in other sectors.

Indonesia is indeed being hit by hyper-regulation. The Center for the Study of Indonesian Law and Policy (PSHK) noted that during the Jokowi administration until November 2019, 10,180 regulations had been issued. The details are 131 laws, 526 government regulations, 839 presidential regulations, and 8,684 ministerial regulations.

This has an impact on overlapping regulations, hindering access to public services, and creating legal uncertainty. For example, the pre-registration process for starting a business alone is regulated by nine laws, two government regulations, four presidential regulations, and 20 ministerial regulations. As a result, just starting a business requires a lot of money, time, and procedures to go through.

It is not surprising that the government's ability to form and implement policies and regulations to encourage business sector development is considered low compared to other countries. An index from the World Bank that measures this capability shows that Indonesia's regulatory quality score from 1996 to 2017 has always been below zero (from a scale of -2.5 to 2.5). In fact, in Southeast Asia, in 2017,



Indonesia only took fifth place with a score of -0.11, far behind Singapore which had a score of 2.12 in first place (PSHK, 2021).

Seeing this fact, the government and DPR's desire to simplify the number of regulations certainly makes sense. But should the simplification of regulations in all sectors be and should be done through an omnibus law approach? In fact, omnibus law is not a very special technique. Indonesia has applied this concept when forming the Decree of the People's Consultative Assembly Number I/MPR/2003. The formation of this decree was deemed unparticipatory and monopolized by the MPR. Now that technique is starting to be forgotten and Indonesia is turning to the approach of codifying or revoking, changing, or canceling laws, which is preceded by a monitoring and evaluation phase to simplify regulations.

The omnibus law technique is actually better known in countries that follow the common law system, such as the United States, the Philippines, Australia, and the UK ((Sodikin, 2020). In America, this technique allows an integrated bill (omnibus bill), which contains amendments or even the replacement of several laws at once, are submitted to parliament for approval in one decision-making opportunity. The advantages of this law are but not more than its multi-sectoral nature and the time of discussion which can be faster than the formation of ordinary laws. This is what is dangerous and has a big impact on democracy if it is applied in a democratic civil law country like Indonesia.

First, the omnibus law has the potential to ignore the formal provisions of the formation of laws. It is fast and it penetrates many sectors, it is feared that it will break through several stages in the formation of laws, both at the planning, drafting, and discussion, ratification, and promulgation levels. This violation is contrary to the principle of the rule of law which requires that all government actions be based on law.

Second, the omnibus law narrows openness and public participation in the formation of laws. In practice in several countries, the formation of omnibus law is dominated by the government or the DPR. The material and time of the process also depend on the agency. Usually the law is sought to be completed as quickly as possible, even in just one decision-making opportunity. As a result, the space for public participation becomes small, even disappears. Whereas the principle of openness and participation in making laws is the main spirit in a democratic country. Violation of this principle is certainly very worrying.

Third, the omnibus law can add to the regulatory burden if it fails to be implemented. With its nature covering more than one aspect that is combined into one law, it is feared that the discussion of the omnibus law will not be comprehensive. The discussion will focus on the omnibus law and forget about the law that will be repealed, which will present a more complex regulatory burden. For example, what are the derivative effects of the repealed law, the impact on its

implementing regulations, and practical implications in the field? Not to mention if this omnibus law fails to be implemented and makes regulatory problems even more complicated. The pretext of *lex posterior derogat legi priori* (the new law overrides the old law) is not enough because arranging regulations cannot be carried out with a one-principle approach.

The non-transparent and participatory process is a color that cannot be removed in describing the process of forming the Job Creation Law. The legislative process is carried out in a hurry, and neglects to present a democratic space. There are 3 arguments that describe this, namely first, the discussion of the bill during recess and outside working hours; second, the absence of draft bills and minutes of meetings being disseminated to the public; and third, the absence of a decision-making mechanism based on a majority vote in the plenary session to ratify the job creation bill into law.

The closure of the democratic space in the discussion of the Job Creation Bill is also due to the minimal space for participation. Open spaces are just a meaningless formality. Meetings that are broadcast live are for presentation purposes only, not decision making. In addition, the meaning of participation cannot be felt because the public is not provided with sufficient information regarding the substance of the bill being discussed and the notes or minutes of previous meetings, making it difficult to monitor meetings properly. Whereas the dissemination of minutes of meetings is an obligation for the DPR which is written in Article 302 paragraph (3) of the DPR Standing Orders which states that the minutes of open meetings are published through electronic media and can be accessed by the public. Dissemination of the draft bill to the public is also the obligation of the legislators as stated in Article 96 paragraph (4) of Law Number 12 of 2011 concerning the Establishment of Legislation. The absence of the latest draft of the bill that has been disseminated has resulted in the existence of various substances in the Job Creation Bill that have escaped public scrutiny. This is coupled with the large number of articles and the format for writing the Job Creation Bill in an omnibus format that is difficult to understand, especially for people who are not used to reading the regulatory format.

As a legal norm in the 1945 Constitution of the Republic of Indonesia, if the formation or amendment of a law is not democratic, and does not fulfill the basic functions of a law philosophically, it will have an impact on democracy in Indonesia. According to Muhamad Ali Safa'at, there are four violations of constitutional values, namely: first, violating the principle of popular sovereignty because it negates the role of the highest authority in the formation of legal products that will become the basis for state administration and determination. The fate of the people. Second, denying the legal position as the main legal product that was established democratically. Third, denying the existence of the legislators themselves, the DPR and the government, as democratic institutions that must always listen, pay attention, and consider the

aspirations of the people. Through this quick method, the amendment to the Omnibus Law (Cipta Kerja) is not in accordance with formal and material principles, so it is not democratic. In addition, failing to meet these problems, the Omnibus Law (Cipta Kerja) Law can be improved in several ways, namely through a legislative review, although it will end with a change in the law which automatically leads to the obligation to follow the stages of law formation, starting from planning, including representation. Fourth, allow the formation of laws as an arena of struggle and domination of power at the expense of justice to protect the rights of the people (Safa'at, 2020).

In this regard, philosophically the Omnibus Law (Cipta Kerja) does not fulfill the function of the law for the following reasons: first, the Omnibus Law (Cipta Kerja) does not accommodate the views and sense of justice of the community, so that the presence of this Law is not fully accepted by the public. Second, the Omnibus Law (Cipta Kerja) tends to be used as a tool to protect the interests of power and entrepreneurs. This is related to arrangements that can benefit the entrepreneur. Whereas the best interests of the people are the main thing and the state must respect it (Saraswati & Basari, 2006).

### **Conclusion**

The formation of the Omnibus Law (Cipta Kerja) is basically influenced by many interests, namely the interests of the Government, the DPR and entrepreneurs, so that the formation of the omnibus law is not entirely pro to the community. The influence of these various interests causes the formation of the Omnibus Law to be considered undemocratic (controversial). As for the legal consequences caused by the formation of undemocratic laws, namely the rejection of the community in the form of demonstrations in various regions, then demands for *judicial review* at the constitutional court, then the existence of draft laws that are not important to be included in the national legislation program, as well as corruption in legislation in the stages of law formation.

The process of forming the Omnibus Law which is not transparent and the lack of public participation is a color that cannot be removed in describing the process of forming the Omnibus Law. The legislative process is carried out in a hurry, and neglects to present a democratic space. Therefore, the constitutional and democratic way that can be taken by the community is to submit a judicial review to the constitutional court so that the Constitutional Court Decision No.91/PUU-XVIII/2020 which states that the omnibus law is declared conditionally unconstitutional which requires it to be revised (revised).

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