



Autocratic Legalism: the Making of Indonesian Omnibus Law

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Abstract

The Indonesian House of Representatives' approval of the Omnibus Law on Job Creation marks a significant enhancement of the business climate and a step forward for labor market flexibility, which should, over time, improve the country's international competitiveness. However, the Constitutional Court delivered shocking decision by declaring that the omnibus Job Creation Law, is partly unconstitutional on November 2021. This study aims to reveal two things. First, procedural injustice in the making of Indonesian Omnibus Law on Job Creation. Second, the root of autocratic legalism and its prevention. The study is a doctrinal legal research with qualitative analysis. It has identified that (1) five violations of procedural justice in the making of the omnibus law reflect autocratic legalism in Indonesia; and (2) three factors contribute to the phenomenon. The three contributing factors are (i) the co-optation of the ruling party in the parliament, (ii) the violations of the law and constitution, and (iii) the undermined judicial independence. Indeed, the cartelization in political parties should be ended. Therefore, citizens need to conduct strengthened collective control. In addition, the independence of the Constitutional Court should be preserved.

I. Introduction

The Indonesian House of Representatives' approval of the Omnibus Law on Job Creation on October 5, 2020 marks a significant enhancement of the business climate and a step forward for labor market flexibility, which should, over time, improve the country's international competitiveness, provided the changes are well implemented. The new law, whose scope is wide-ranging, should help to reduce longstanding impediments to doing business in Indonesia by reducing red tape, simplifying land acquisition processes, easing restrictions on foreign investment, loosening labor laws and providing more incentives to free-trade zones (Soraya, 2021). Indonesia's ranking for the World Bank's annual survey of Ease of Doing Business has improved significantly in recent years, but at 73rd out of 190 countries in 2020, is still below the median for "BBB" sovereigns.

al., 2020). The first lies on the deliberation method of the Law. The omnibus method is not recognized under the prevailing system. The Law on Lawmaking has not stipulated it yet as a procedure of lawmaking. The second covers the hasty and closed-door deliberation and the lack of public participation. According to a survey conducted by Kompas, the Law is deemed undemocratic by 59.7%; and democratic by only 20.7%; while the other 19.6% of the respondents said that they do not know (Kompas, 2020).

The controversy over the Law on Job Creation led to Constitutional Court Verdict Number 91/PUU-XVIII/2020. The Court declared the law conditionally unconstitutional due to procedural flaws in its formation. The law must be amended within two years. Otherwise, it would be permanently unconstitutional. The amendment to the *omnibus law* must be made in accordance with the principles established in laws and regulations (See Constitutional Court Verdict Number 91/PUU-XVIII/2020, p. 413).

In recent years, law has been made as if democracy was upheld, but in fact democracy has been hijacked (Scheppelle, 2018). Scheppelle calls it autocratic legalism. This study aims to shed a light on two points: (1) procedural injustice in the making of the omnibus law in Indonesia; and (2) the root and prevention of autocratic legalism in Indonesia. It is doctrinal legal research using secondary data. It employed the statutory approach. For instance, it used the Indonesian 1945 Constitution, The Law on Job Creation, and The Law on Lawmaking. In Addition, it also use conceptual approach before the data was analyzed qualitatively. The study used only secondary data. A positive legal inventory became an initial and basic activity to conduct research and assessment in the study.

II. Five Violations of Procedural Justice

Law is made through a political process (Unger, 1983). Thus, constitutions, laws, and regulations are all needed. Each of them does not only serve political interests. In addition, it is important to establish procedures of lawmaking as well as enable participation and aspiration (Alexander, 2018).

The first point to discuss is the process of making the Law on Job Creation. The law was deliberated through omnibus method. It was promoted long before the making of the Law. The idea was even discussed in October 2019. However, when the Law Number 12 of 2011 on Lawmaking was amended in October 2019, the omnibus method was not discussed at all. Consequently, the Law Number 15 on 2019 on the amendment to the Law Number 12 on 2011 does not stipulate it. With the absence of rules, a law can be made in an authoritarian manner. Prior to the adoption of the omnibus method, the lawmakers should have inserted the method into the Law Number 15 of 2019. It is made and has a binding force, containing commands and prohibitions imposed on the people and citizens. Rosseau (1994) says that state exercises the popular sovereignty across a wide of sectors, including lawmaking. Therefore, the sovereignty should be limited (Rousseau, 1994). The popular sovereignty is exercised by elected representatives. They should be subject to the general will enshrined in the constitution.

Constitutions are not just *ex post* descriptions of an existing political order. They are intended to create an order. A constitution is an antecedent to a government. The constitution of a state is not the act of government but of the people constituting its government (Przeworski and Simpson, 2014). In the perspective of democracy, president and parliament in presidential system merely exercises popular sovereignty in lawmaking. They only reflect people's will. The authority must be exerted pursuant to the constitution as the supreme law of the land. When the authority is granted, the limitation of power and people's will must be upheld as the sovereignty shall be vested in the hands of the people (Tushnet, et al., 2013).

In sum, lawmaking should be based on the two things. Meanwhile, there are a number definitions of law. According to Article 1 point 2 of Law Number 12 of 2011 on Lawmaking, laws and regulations are "written regulations containing generally binding legal norms and made or enacted and issued by authorized State institutions or officials through a procedure established in laws and regulations".

According to the stipulation above, laws and regulations must: (1) be written; (2) contain generally binding legal norms; (3) be made or enacted and issued by authorized state institutions or officials; and (4) be through a procedure established in laws and regulations. In other words, procedural aspects are of paramount importance. Therefore, they must not be ignored. They are needed to legitimize law. In principle, power must be limited. When power is exercised, there must be formal limitation, including procedures. It means that law must be made through particular concepts and mechanisms agreed on earlier. The concepts also apply to legislation (Posner, 2003). In sum, lawmaking should be based on the two things. On the other hand, there are a number definitions of law. According to Article 1 point 2 of the Law Number 12 of 2011 on Lawmaking, laws and regulations are written regulations that contains generally binding legal norms; and made, or enacted, and issued by authorized state institutions or officials through a procedure established in laws and regulations. Therefore, laws and regulations must (1) be written; (2) contain generally binding legal norms; (3) be made or enacted and issued by authorized state institutions or officials; and (4) be through a procedure established in laws and regulations. In other words, procedural aspects are the most important. They must not be ignored; and are needed to legitimize law. Essentially, power must be limited. When power is exercised, there must be formal limitation, including procedure. Law must be made through particular concepts and mechanisms agreed on earlier, which also apply to legislation (Posner, 2003).

Galligan states that with no procedure, law and its institutions cannot meet the aims. In the contexts of courts, administrative decisions, or legal processes, procedures play an important role to guarantee that issues are well addressed to reach valid conclusions or decisions. Galligan also explains the importance of procedures in three points. First, procedural law is necessary to make decisions and continue processes; thereby it serves the purposes of law. Second, the relationship between procedures and results is more complex than imagined. Procedures are needed to serve other purposes and values,

like results. Third, procedures always deal with *fairness* (Galligan, 1997). They must reflect the popular sovereignty. Citizens have the rights of participation, aspiration, and transparency in lawmaking. Therefore, procedures are at the heart of the legislative process.

The second thing is the omnibus method. The *one for all* method is able to reform conflicting laws and make them congruent. Nevertheless, there are no coherent term and practice. According to Duhaime Legal Dictionary, omnibus law is *“a draft law before a legislature, which contains more than one substantive matter or several minor matters which have been combined into one bill, ostensibly for the sake of convenience”*.

The first problem is caused by the *“one substantive matter or several minor matters”*. In general, omnibus law governs several related clusters, e.g. budget implementation (in Canada and the United States). However, in Ireland, the omnibus law was wide ranging. As a result, it was heavily criticized. The Omnibus Law on Job Creation has combined 11 clusters with different legal characteristics and paradigms. Combining them in a concept is problematic. Louis Massicotte cites the peril of Omnibus Law in *Commonwealth vs Barnett*. *“Bills, popularly called omnibus law, became crying evil, not only form the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by facility they afforded to corrupt combinations of minorities with different interest to force the passage of bills with provisions which could never succeed if they stood on their separate merits”* (Massicotte, 2013).

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This method is not simple, but tends to be confusing. For instance, the Law named the Omnibus Bill on Job Creation. Due to its wide-ranging clusters, it has violated the annex to the Law Number 12 of 2011 as an integral part of the law. If a law repeals another law, the title must reflect it. However, the Law Number 12 of 2011 has not recognized the omnibus method.

In terms of public participation, the citizens should participate according to the clusters or 11 laws on 11 clusters. A lawmaking with wide-ranging clusters does not contribute towards discourses and meaningful participation. Thus, there have been a number of debates and fatal errors. Since it is formal review, the violation will not be

discussed at length. With hasty deliberation and several clusters, it was a lack of public participation. In other words, there was no meaningful participation.

The Third is that the process was directly violated. Three other violations are the hasty deliberation, in-transparency, and absence of participation. Pursuant to Article 18 of the Law Number 12 of 2011, the preparation of draft laws must be based on, among others, public aspiration and legal needs. Article 96 of the law stipulates that the public has the right to contribute inputs orally and/or in writing during lawmaking process, either in public hearings, work visits, disseminations, seminars, workshops, and/or discussions. The public has a concern with the content of a draft law, so it must be accessible to them. However, the provision was infringed in the formulation of the Omnibus Law, particularly during the deliberation. The discussion involving the House of Representatives, the Regional Representatives Council (as the House's co-legislator), and the President is worth noting. The number of commissions at DPR reflects governing powers (clusters). Having the-wide-ranging clusters, the commissions should collaborate. The involvement of parties should be questioned. Furthermore, the deliberation is not deemed representative. The omnibus method does not fit the concept of lawmaking according to the Law Number 12 of 2011 and Number 17 of 2014 on the People Consultative Assembly, the House of Representatives, the Regional Representative Council, and the Regional House of Representatives, and the implementing regulation, i.e., the Code of Conduct. Nonetheless, all of them were violated.

The fourth is that the 1945 Constitution stipulates five stages of lawmaking: submission, discussion, approval, ratification, and promulgation. Legal policy, according to Mahmudin, is comprised of at least three elements: (1) "the blueprint" for drafting policies and rules, (2) the political tug-of-war in the deliberation and approval, and (3) the implementation of the policy (Mochtar, 2012).

The blueprint constitutes the concept of laws and regulations related to the system that will be made in the policy. Therefore, it contains philosophical, legal, and sociological views. They must also be contained in academic paper. However, the 2,278-page academic paper does not contain the legal policy. From the 11 clusters in the omnibus law, the legal policy is unclear. For instance, in terms of licensing, there is no description about the concept of licensing. The cluster is related to forestry, environment, land, etc. In other words, the blueprint for licensing and state's view on those sectors need to be clarified. Law is not *einmaleigh* (one-time), but it must be *forward-looking* and applicable to the other clusters.

In terms of the blueprint, the probable political dynamics is a matter of concern. Law is made through a political process. Hence, constitutions, laws, and regulations are needed. They do not only serve political interests. Democracy is not merely about the majority against rationality. In democracy, rationality requires the supremacy of the constitution to limit the government's power. "*One of the central points of such a constitution is to solve problems that are particularly likely to arise in that nation's ordinary*

political life. Democratic constitutions are not mere paper but pragmatic instruments, designed to solve concrete problems and to make political life work better” (Sunstein, 2001).

Indeed, participation, aspiration, adjustment, and inputs are necessary. However, they were all infringed in the making of the Omnibus Law. There was hardly participation and transparency. Additionally, the deliberation was hasty. It did not contribute to the discourses and meaningful participation according to the Law Number 122 of 2011. Lawmaking in Indonesia is prone to politicization and transaction. Since the President is involved in the deliberation and joint approval, the President is powerful in lawmaking process. The powers enable the House of Representatives and the President to engage in a political transaction. Due to considerable political interests in the House of Representatives, the transaction is likely to be undertaken, for example in the making of the Law on Tax Amnesty and the Law on Corruption Eradication Commission.

The fifth covers the editorial coup. The fatal error was even happened after the law had been passed. There must be no revision after the joint approval. Revision must be completed in the deliberation. Thus, before the approval, the Law is already complete. It is the main part of lawmaking, as discussed above.

According to Article 72 paragraph 1 and 2 of the Law Number 12 of 2011, a draft law that has been jointly approved by the House and the President is submitted to the latter to be formalized as a law not later than seven days. According to the elucidation of the article, seven days is considered sufficient for technical work relating to processing the draft Law into official Presidential Document, the signing of Law by the President, as well as the signing and the promulgation in the State Gazette of the Republic of Indonesia. In other words, technical work may be done but substantial change may not be made. Even punctuation may not be changed as it can change the meaning.

Nonetheless, the change was made after the Omnibus Law had been passed. The “editorial coup” may have been staged. Isra introduced the term in Kompas, 19 October 2009, or 11 years ago. He states that there are probabilities of the editorial coup. First, before the draft made by the special committee or commission was brought to the plenary session. The session should have prevented the editorial coup so that all House members and the government had to read the draft law before the joint approval. Second, after the plenary session of the House, it was difficult for the House members to know. In addition, the House members tend not to read a law. Without the distribution of the draft, they could not read it. Third, the editorial coup was staged by the government prior to the ratification and promulgation in the State Gazette. At this stage, the draft law was in the hand of the government. Consequently, it was almost impossible for the House to check. As it is the final stage, the editorial coup was found in the implementation.

III. The Root and Prevention of *Autocratic Legalism*

The five procedural violations have undermined lawmaking process in Indonesia. The making of the omnibus law is a sign of autocratic legalism. The lawmakers have

violated several principles of lawmaking. Authoritarian lawmaking infringes the rules of the game and constitution (Barros, 2002).

This is what Dixon and Landau call as new authoritarianism under liberal democracy. Dixon and Landau show that constitutionalism has not been able to put an end to abuse of power. Authoritarians have taken advantage of liberal democracy for a few decades (Dixon and Landau, 2021).

States of the World are suffering democratic regression, broadly defined as a loss of democratic quality. These developments can be observed in a variety of places and dominate today's headlines. Among many examples, Hungary and Poland's democratic quality has deteriorated as well as in Erdoğan's Turkey, Russia under Putin, Duterte in the Philippines, or the United States of America under Trump. These factors are usually combined into bigger clusters, often ordered along the basic social science distinction between economic, societal, cultural, and political factors (Gerschewski, 2021).

In lawmaking, there are three indicators of autocratic legalism: (1) the co-optation of the ruling party in the parliament, (2) the violations of the law and constitution, and (3) the undermined judicial independence (Corrales, 2015). The three indicators are found in the regime of President Joko Widodo and Vice President Ma'ruf Amin. There is no line of demarcation between the executive and legislative branches. The President Joko has a strong grip on the ruling party and the majority in the parliament. The relation between the President and the House is described as follows.

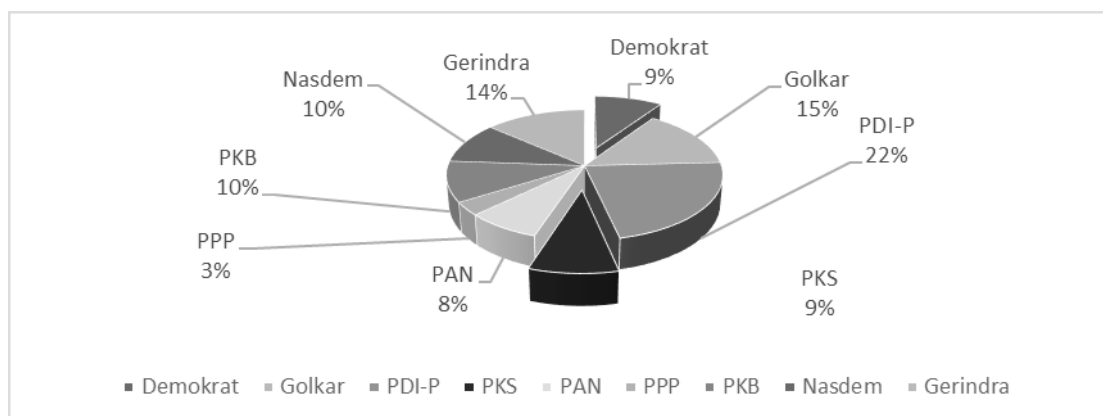


Figure 1. Relation between the President and the House of Representatives

Source: (Rishan, 2020)

PKS is the only opposition party. Although Democratic Party neither voted for nor rejected the law, the President was supported by more than 80% of the legislators. The accommodative relation between the House and the President, tend to make them compromise in lawmaking processes. In fact, the coalition has often been detrimental to President Widodo's administration. In short, Power and Warburton states that autocratic leadership has risen amid the democratic recession. It leads to the violation of the law and constitution. Among autocrats, law is used to legitimate their actions and authority (Cody, 2021).

Then, there is democratic regression owing to *lawfare*, i.e., the abuse of law and law enforcement agencies by political actors for their-own advantage. The politicization of politics undermines the protection of human rights, supremacy of law, and civil society organizations, particularly those playing the role of the opposition (Power and Warburton, 2021). It also undermines constitutionalism by eliminating parliamentary control and the participation of civil society (Huq and Ginsburg, 2017). This phenomenon is systematically detrimental to democracy (Haggard and Kaufman, 2012).

The third is the undermined judicial independence. The third amendment to the Law on the Constitutional Court cannot be separated from the interests of the President and DPR. In many states, autocratic legalism has undermined the role and independence of the judiciary in three ways. First, it changes the composition of the judges of the Constitutional Court. Second, it amends the rule of their term of office. Third, it amends the rule of selecting the justices of the Court. The concern for autocratic legalism does make sense. According to Law Number 24 of 2003 on the Constitutional Court, the term of office of judges is five years and they can only be re-appointed for another term of office (Butt, 2015). After the amendment to this law, judges are discharged honorably at the age of 70 (See Article 23 point [c] of the Law Number 7 of 2020 on the Third Amendment to the Law Number 24 of 2003 on the Constitutional Court). Nevertheless, it has retroactive effect. In other words, the current justices of the Constitutional Court must retire at 70 years of age.

In short, the government attempted to win support from the judiciary for their strategic policy through lawmaking. Ginsburg and Mustofa state that authoritarian regimes frequently make use of the judiciary to their own gain. The judiciary helps exert social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and legitimize those regimes (Ginsburg and Moustafa, 2018).

Based on the data and analysis, there is an urgency to stop autocratic legalism. There are three steps to put an end to autocratic legalism. The first is through institutional reform of political parties. After 20 years of democratization, the institutional reform still has not been of concern. New parties have not been capable of changing political behavior inherited from the New Order.

The political cartel of the overweight coalition in the parliament has detrimental impacts on law. The cartelized political system is formed through the control of political parties and elections. State patronage is crucial in the workings of Indonesia's political cartel influential businessmen, state bureaucrats, military personnel, and police officers form part of the larger network of power, and they are represented in key state institutions to provide political support and security to the President. As a result, governance and state institutions are shaped by the cartel's social, political, and economic interests (Wiratraman, 2021).

Ambardi (2008) reveals that political parties in Indonesia and Europe underwent different patterns of development. Throughout history, the parties in Europe were

more neatly developed. It has huge impacts on the way they gaining financial support. Furthermore, they have limited capability, experience, and insight in generating revenue. From a theoretical perspective, they would systematically be reliant on the state. Consequently, old and new parties are cartelized (Ambardi, 2008). Institutional accountability of political parties, such as funding management and internal democratization, needs to put an end to rent seeking among them. Furthermore, autocratic legalism stems from the poor performance of political parties and their failure to reform their institutions (Sethi, 2021).

The second is collective popular control. Democracy must be subject to citizen control and political equality. The two principles are the requirements for institutional reform. Without them, institutional reform in liberal democracy is doomed to fail. The actors never embrace democracy, in contrast what scholars say about transition. As a result, there is no new democracy. Oligarchs will not fall due to criticism. Effective popular control necessitates capacity building of citizen control in policy-making and its implementation (Samadhi, 2021).

The disruption era can be a turning point in how citizens control the lawmakers. Digital technology can be used in surveys or petitions in every step of lawmaking. The public should be able to participate in the current social context and development. Further, the law on lawmaking should stipulate the engagement of the public in lawmaking. Thus, their participation is not abstract anymore but concrete and measured. It brings about the shift from “*rule of law*” to “*rule of a good law*” (Ginsburg and Huq, 2018).

The third it the maintainance of the judicial independence. There will be no *rule of a good law* without an independent judiciary. In this respect, the Constitutional Court is a pillar of reform that must be free from any political interests. the Constitutional Court will eventually adjudicate the policy made by the government. The court may not only legitimize the unilateral action of lawmakers. Poland and Hungary may provide something to learn. The politicization of the judiciary will only lead to legitimizing the government power. The third amendment to the Law on the Constitutional Court shares several similarities to autocratic legalism in Hungary and Poland. There, the government has intervened in the judiciary by means of a political process, amending the law on judicial appointments. In Hungary, for instance, Orban’s administration has increased the number of Constitutional Court justices from eight to fifteen. Besides, the ruling party can directly appoint new judges (Kosař and Šipulová, 2018).

In Poland, the party that won the election rejected the nominee suggested by the party supporting the previous regime. Then, five new justices were appointed to delegitimize the nominee. The authoritarian regime attempted to influence the Constitutional Court to its benefit (Wyrzykowski, 2019). Therefore, the independence of the judiciary must be defended and the government may not amend the Law on the Constitutional Court at will. An independent judiciary is the last bastion of democracy (Ziblatt, 2018).

IV. Conclusions

This study shows that the making of the Indonesian Omnibus Law has undermined democracy. The lawmakers, the President and the House of Representatives, have violated procedural justice in the process. The study reaffirms that they have reflected *autocratic legalism*. Instead of fulfilling and protecting human rights, the lawmaking process has been used to legitimize the regime. Furthermore, three factors drive *autocratic legalism* in Indonesia. First, there is a co-optation of the ruling parties in the parliament. The parties tend to be pragmatic and their coalition has been driven by rent seeking, instead of ideological platforms. To make matters worse, it has led to cartelization so that the oligarchs gain benefits from the lawmaking. Second, law and constitutionalism have been violated. The monitoring function of the parliament has been eliminated by super majority and the principles and norms in lawmaking have often been violated. Third, the third amendment to the Law on the Constitutional Court has undermined the independence of the judiciary body. It shows that the co-optation has taken place in the legislative and the other democratic institutions, i.e., the judiciary. To put an end to autocratic legalism, the political parties should be reformed. In addition, public participation needs promotion. Last but not least, the Constitutional Court should be maintained.

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