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Constitutional Issues of the Job Creation Law and Government Regulation in Lieu of Law Number 2 of 2022 from a Constitutional Theory Perspective

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Abstract *The Constitutional Court Decision Number 91/PUU-XVIII/2020, which declared the Job Creation Law conditionally unconstitutional, required the legislature to make corrections through the ordinary legislative process. This study aims to analyze the legal politics behind the enactment of the Job Creation Government Regulation in Lieu of Law (Perppu), which was later ratified as Law Number 6 of 2023, from the perspective of constitutional supremacy and contemporary constitutional theory. The research employs a normative juridical method with statutory, conceptual, and judicial decision approaches. The findings indicate that the issuance of the Job Creation Perppu constituted an emergency*

legislative strategy to preserve policy substance after constitutional correction by the Constitutional Court, rather than merely a response to a situation of compelling urgency. This practice reflects tendencies of abusive constitutionalism and constitutional hardball, as constitutionally granted powers were exercised in a formally lawful manner while disregarding constitutional ethics and the corrective function of the Constitutional Court. This study concludes that the enactment of the Job Creation Perppu signifies a crisis of constitutional supremacy in the practice of emergency legislation in Indonesia.

Keywords *Constitutional Emergency Powers; Constitutional Supremacy; Omnibus Law*

Abstrak Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 yang menyatakan Undang-Undang Cipta Kerja inkonstitusional bersyarat mewajibkan pembentuk undang-undang melakukan perbaikan melalui mekanisme legislasi biasa. Penelitian ini bertujuan menganalisis politik hukum pembentukan Perppu Cipta Kerja yang kemudian ditetapkan menjadi Undang-Undang Nomor 6 Tahun 2023 dalam perspektif supremasi konstitusi dan teori konstitusi kontemporer. Metode penelitian yang digunakan adalah yuridis normatif dengan pendekatan perundang-undangan, konseptual, dan putusan pengadilan. Hasil penelitian menunjukkan bahwa penerbitan Perppu Cipta Kerja merupakan strategi legislasi darurat untuk mempertahankan substansi kebijakan pasca koreksi konstitusional Mahkamah Konstitusi, bukan semata respons terhadap kegentingan yang memaksa. Praktik tersebut merefleksikan kecenderungan abusive constitutionalism dan constitutional hardball karena kewenangan konstitusional digunakan secara formal sah tetapi mengabaikan etika konstitusional dan fungsi korektif Mahkamah Konstitusi. Penelitian ini menyimpulkan bahwa pembentukan Perppu Cipta Kerja menandai krisis supremasi konstitusi dalam praktik legislasi darurat di Indonesia.

Kata Kunci *Kegentingan yang Memaksa; Omnibus Law; PERPPU Cipta Kerja; Supremasi Konstitusi; Teori Konstitusi*

A. Introduction

Modern rule of law states place the constitution as the supreme law, serving not only as a source of power legitimacy but also as an instrument to limit power. From a constitutional theory perspective, a constitution is born to ensure that state power is exercised in a limited, controlled, and responsible manner thru democratic legal mechanisms. This principle is reflected in the idea of constitutional democracy, which is a system of government that combines popular sovereignty with the supremacy of the constitution as the primary controller of state actions. In the Indonesian context, this commitment is explicitly affirmed in Article 1 paragraph (3)

of the 1945 Constitution of the Republic of Indonesia, which states that Indonesia is a state of law.¹

As a consequence of the rule of law, the formation of legislation cannot be understood solely as a political process, but rather as a constitutional process that must adhere to the principles of legality, legal certainty, transparency, and public participation. In the theory of due process of law, the procedures for creating laws are just as important as the substance of the law itself. Laws born from procedurally flawed processes have the potential to lose their constitutional legitimacy, even though they are materially intended to achieve goals considered good by the lawmakers.

The omnibus law method itself, which originates from the common law tradition and is known in the legislative practices of countries like the United States and Canada, is still considered premature in Indonesia's civil law tradition and is not yet accompanied by adequate legal basis within the framework of national lawmaking. The implementation of this method in Indonesia has come under scrutiny because it not only simplifies regulations but also results in complex legal norms without clear substantive connections, and with minimal public participation in many stages of its drafting. Some researchers state that this reflects an incompatibility between the concept of omnibus law and the structure of the national legal system.

In the Indonesian legal system, which is rooted in the civil law tradition, the conventional law-making process is structured based on the principles of unity of content, clear systematics, and logical relationships between norms. This principle was then institutionalized in Law No. 12 of 2011 Jo. Law No. 13 of 2022 concerning the Formation of Legislation, which emphasizes the principles of clarity of purpose, suitability between type and content, and openness. This framework is essentially designed to ensure that laws are formed rationally, transparently, and constitutionally accountable.²

However, in contemporary constitutional practice, there is a strong tendency to prioritize regulatory efficiency in response to socio-economic complexity and the demands of globalization. One manifestation of this trend is the use of the omnibus law method, which is a legislative technique that combines changes or repeals of many laws into a single law. In countries with common law traditions like the United States and Canada, omnibus bills have developed as a relatively established legislative practice because they are supported by strong parliamentary systems and constitutional conventions. However, in the context of civil law countries, this method is often seen as problematic if not accompanied by clear normative regulations.³

¹ Bayu Aryanto, "Demokrasi Deliberatif Dalam Konsep Amandemen Konstitusi Indonesia," *Mulawarman Law Review* 5, no. 2 (2020): 96–113. <https://doi.org/10.30872/mulrev.v5i2.366>.

² Josef Mario Monteiro, "Penyusunan Undang-Undang Melalui Metode Omnibus Law Dan Consolidation Law," *Strata Law Review* 1, no. 1 (2023): 24–42. Retrieved from <https://journals.stratapersada.com/index.php/slr/article/view/v1no24-42>

³ Monteiro, "Penyusunan Undang-Undang Melalui Metode Omnibus Law Dan Consolidation Law," 2023.

Indonesia adopted the omnibus law method by enacting the Job Creation Law, with the primary goals of boosting investment, creating jobs, and simplifying regulations deemed overlapping. In terms of policy, this goal is positioned as a response to the economic slowdown and low investment competitiveness. However, from a legal-constitutional perspective, the application of the omnibus law method in the Job Creation Law raises fundamental issues because it lacks an explicit regulatory basis within the system of lawmaking. This method was widely and massively implemented by amending hundreds of articles from dozens of cross-sectoral laws, leading to criticism regarding legal certainty, regulatory systematics, and the openness of the legislative process.⁴

This issue reached a critical point when the Constitutional Court, thru Decision Number 91/PUU-XVIII/2020, declared the Job Creation Law conditionally unconstitutional. The court found that the law-making process contained procedural flaws, particularly regarding the principles of transparency and meaningful public participation. From the perspective of constitutional supremacy theory, this decision reaffirms the role of the Constitutional Court, which not only tests the substance of norms but also safeguards the integrity of the legislative process.⁵

However, instead of making revisions thru the usual legislative mechanisms as ordered by the Constitutional Court, the government instead issued a Government Regulation in Lieu of Law on Job Creation, namely Government Regulation Number 2 of 2022 on Job Creation, which was made into Law. This step sparked serious debate because the decree can only be issued constitutionally in conditions of compelling urgency. In constitutional theory, this authority is categorized as constitutional emergency power, which is extraordinary power that is only legitimate when used to address extraordinary circumstances.⁶

Theoretically, this phenomenon becomes an arena of tension between regulatory efficiency, the legitimacy of constitutional democracy, and the limitation of state power. On one hand, the government claims the omnibus law and the presidential regulation as instruments for accelerating investment and streamlining overlapping regulations for economic growth. However, from a constitutional and legal perspective, the use of legislative methods without a strong normative basis and emergency instruments without clear evidence of urgency actually contradicts the principles of due process of law, checks and balances, and constitutional supremacy, which are the pillars of a rule of law state. This is supported by a number of scientific analyzes that confirm that legitimacy and due process must remain top

⁴ Suryati Suryati et al., "Tinjauan Hukum Terhadap Omnibus Law Undang-Undang Cipta Kerja," *Simbur Cahaya*, 2021, 97–111. <https://doi.org/10.28946/sc.v28i2.902>

⁵ Fahri Bachmid, "Pembentukan Peraturan Pemerintah Pengganti Undang-Undang Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020," *Reformasi* 13, no. 2 (2023): 195–203. <https://doi.org/10.33366/rfr.v13i2.4479>

⁶ Bachmid, "Pembentukan Peraturan Pemerintah Pengganti Undang-Undang Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020." <https://doi.org/10.33366/rfr.v13i2.4479>

priorities in the formulation of regulations that have a broad impact on citizens' constitutional rights and the national legal structure.

The context of the formation of the Job Creation Law and the issuance of the Job Creation Perppu is not only about economic policy, but also reflects fundamental constitutional issues in the practice of positive lawmaking in Indonesia. This issue is not only relevant in academic studies but also has real implications for legal legitimacy, public engagement, and the balance of power within Indonesia's constitutional system.

B. Methods

This research uses a normative legal research method with a conceptual approach, a statute approach, and a case approach. Normative legal research was chosen because the study's focus is directed toward analyzing legal norms, principles, and constitutional principles that regulate the formation of laws and the President's authority to issue Government Regulations in Lieu of Law (Perppu).⁷ The statute approach is used to examine the provisions of Article 20, Article 22 paragraph (1), and Article 22A of the 1945 Constitution of the Republic of Indonesia, Law Number 12 of 2011 jo. Law Number 13 of 2022 concerning the Formation of Laws and Regulations, as well as Perppu Number 2 of 2022 concerning Job Creation. Meanwhile, the case study approach focuses on analyzing Constitutional Court Decision Number 91/PUU-XVIII/2020 and Constitutional Court Decision Number 138/PUU-VII/2009 to assess the fulfillment of the constitutional requirements for urgent necessity and its implications for the principle of constitutional supremacy.

A conceptual approach is used to examine constitutional doctrines and theories, specifically the rule of law theory, limited government, the state of emergency theory, and constitutional democracy.⁸ The legal materials used include primary legal materials such as legislation and court decisions, secondary legal materials such as relevant textbooks, academic journals, and articles, and tertiary legal materials such as legal dictionaries and encyclopedias. Data analysis was conducted qualitatively using a prescriptive-analytical method, which involves systematically and critically interpreting legal norms to assess the alignment between the practice of forming the Omnibus Law and applicable constitutional principles. The results of the subsequent analysis are used to formulate legal arguments and normative recommendations to strengthen state practices that are in line with constitutional democracy and the supremacy of the constitution.

⁷ Yohanes Suhardin and Henny Saida Flora, "Eksistensi Putusan Mahkamah Konstitusi Pasca Disahkannya Undang-Undang Penetapan Perpu Cipta Kerja," *Jurnal USM Law Review* 6, no. 1 (2023): 320–31. <https://doi.org/10.26623/julr.v6i1.6307>

⁸ Muhammad Fakhrul Haq et al., "Eksistensi Perppu No. 2 Tahun 2022 Tentang Cipta Kerja Pasca Dikeluarkannya Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020," *JURNAL USM LAW REVIEW* 8, no. 2 (2025): 991–1005. <https://doi.org/10.26623/julr.v8i2.11068>

C. Result and Discussion

1. The constitutionality of the Job Creation Perppu in all its normative problems

In constitutional theory, the formation of laws is a manifestation of the people's sovereignty exercised thru representative mechanisms and constrained by the constitution. The principle of constitutional democracy places legislation not merely as a political product, but as a constitutional process that must adhere to the values of the rule of law, such as legal certainty, openness, rationality, and public participation. This is in line with the doctrine of due process of law in legislation, which emphasizes that the legitimacy of a law is determined not only by the content of the norm but also by its formation process.⁹

In the context of Indonesia, the principle is institutionalized in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia and further detailed in Law No. 12 of 2011 jo. Law No. 13 of 2022 on the Formation of Legislation. The law explicitly emphasizes the principle of clarity of purpose, the appropriateness between the type and substance of the content, and the principle of openness as the foundation for law-making. Thus, every innovation in legislative methods, including the use of omnibus laws, should first have normative legitimacy within the framework of regulatory formation law.

a. The Omnibus Law Method and the Unpreparedness of Indonesia's Normative Framework

The Job Creation Law was formed using the omnibus law method, which is a legislative technique that combines changes to many cross-sector laws into a single law. Theoretically, this method is known in the common law legal system, especially in the United States and Canada, as a legislative technique for efficiency.¹⁰ However, in a civil law system like Indonesia, this method did not have an explicit regulatory basis in Law Number 12 of 2011 concerning the Formation of Legislation at the time the Job Creation Law was enacted. Therefore, it is clear that the formation process did not have a legal basis for the omnibus law method in Indonesia, meaning the government created it using the omnibus law method without a legal basis, which clearly undermines the regulatory formation process in terms of legal certainty. Afterward, the government issued Law Number 13 of 2022 concerning the second amendment to Law Number 12 of 2011 on the

⁹ Bayu Aryanto, "Demokrasi Deliberatif Dalam Konsep Amandemen Konstitusi Indonesia," *Mulawarman Law Review* 5, no. 2 (2020): 96–113. <https://doi.org/10.30872/mulrev.v5i2.366>

¹⁰ Josef Mario Monteiro, "Penyusunan Undang-Undang Melalui Metode Omnibus Law Dan Consolidation Law," *Strata Law Review* 1, no. 1 (2023): 24–42. Retrieved from <https://journals.stratapersada.com/index.php/slr/article/view/v1no24-42>

Formation of Legislation, which regulates the omnibus law method in the formation of laws.

The lack of ideality arises because the omnibus law method was applied without first structuring its normative framework. The Job Creation Law thru Law Number 11 of 2020 amended more than a thousand articles from dozens of laws with different characters, fields, and regulatory purposes. From the perspective of legal system theory, this condition poses a serious problem for the principle of legal certainty and the systematics of legislation. Legal norms become difficult to understand, access, and implement consistently, which ultimately contradicts the purpose of law as a means of certainty and justice.

b. Analysis of Constitutional Court Decision No. 91/PUU-XVIII/2020 as a crisis of constitutional supremacy.

The Constitutional Court's (MK) Decision Number 91/PUU-XVIII/2020 was actually designed to uphold the supremacy of the constitution by assessing Law Number 11 of 2020 on Job Creation as conditionally unconstitutional due to formal defects in its formation process. The Constitutional Court (MK) decided that the law was contrary to the 1945 Constitution and imposed a two-year period for lawmakers to amend its substance and procedure; otherwise, the law would become permanently unconstitutional. This demonstrates the position of the Constitutional Court as the guardian of the constitution, striving to assert the principle that all laws must adhere to the supreme law of the land.¹¹

However, in practice, the response of the executive and legislative institutions shows indecisiveness toward the ruling, which has implications for the crisis of constitutional supremacy. Instead of making improvements in accordance with the ruling, the government issued the Job Creation Perppu and then ratified it into Law No. 6 of 2023, which substantively maintains the validity of norms almost identical to the original law. This results in non-compliance with the Constitutional Court's order to amend the law thru the ordinary legislative process. Normative studies state that the existence of the Constitutional Court's Decision post-enactment of the law becomes seemingly "neither here nor there," because the decision's order for substantive amendments was not implemented.

This phenomenon has been analyzed in legal literature as a form of constitutional disobedience, where final and binding decisions according to Article 24C paragraph 1 of the 1945 Constitution and Article 10 paragraph 1 of the Constitutional Court Law are not substantially complied with by lawmakers. This noncompliance, according to several researchers, undermines the principle that the Constitutional Court's decisions must be

¹¹ Lalu Hedwin Hanggara, "Diskursus Keberlakuan UU Cipta Kerja Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020," *Al-Qisth Law Review* 5, no. 2 (2022): 233. <https://doi.org/10.24853/al-qisth.5.2.233-260>

unconditionally fulfilled by all parties and has the potential to create a "delay in constitutional justice" that erodes legal certainty for the applicants and the broader community.

In the context of constitutional supremacy, this situation reflects the failure of the constitutional system to maintain the hierarchy of norms, because the instrument that should amend the law based on judicial decisions is instead used to reinforce the substance that the decision deemed flawed. In other words, legislative and executive actions that exceed or ignore the mandates of the Constitutional Court's decisions not only create a dualism of norms but also raise fundamental issues in the relationship between the judiciary and lawmakers, which at some point can diminish the credibility and effectiveness of the Court as the guardian of the constitution.¹²

c. Implications of the Enactment of the Job Creation Perppu into Law No. 6 of 2023 on the Supremacy of the Constitution

in Law Number 13 of 2022, the ratification of the Job Creation Perppu thru Law No. 6 of 2023 has placed Constitutional Court Decision No. 91/PUU-XVIII/2020 in a constitutionally ambiguous position. The Constitutional Court's decision stated that the Job Creation Law (Law No. 11/2020) was formally inconsistent with the 1945 Constitution and granted a two-year period for rectification thru ordinary legislation, not the issuance of a government regulation in lieu of law (Perppu). With the enactment of the Job Creation Perppu into Law No. 6 of 2023, the essence of the Constitutional Court's ruling seems to be "both present and absent" substantively because the mandated rectification process was not carried out according to ordinary legislative mechanisms but was instead cut short by the conversion of the Perppu into law. Normative studies find that the existence of the Constitutional Court's ruling post-enactment of the Job Creation Law is perceived as being in a state of limbo due to non-compliance with the constitutional mandate itself.¹³

From a political-legal perspective, the enactment of the Job Creation Perppu into law indicates a shift in constitutional sovereignty, where the executive-legislative power exploits constitutional instruments (Perppu) to perpetuate controversial regulations without complying with the orders of the highest court. This has implications for the supremacy of the constitution because the final and binding ruling of the Constitutional Court

¹² Mohammad Agus Maulidi, "Tafsir Konstitusional: Kriteria Pembentukan Peraturan Pemerintah Pengganti Undang-Undang Dalam Putusan Mahkamah Konstitusi (2003-2023): Constitutional Interpretation: Criteria for the Issuance of Government Regulations in Lieu of Law in Constitutional Court Decisions (2003-2023)," *Jurnal Konstitusi* 22, no. 2 (2025): 293-312. <https://doi.org/10.31078/jk2224>

¹³ Yohanes Suhardin and Henny Saida Flora, "Eksistensi Putusan Mahkamah Konstitusi Pasca Disahkannya Undang-Undang Penetapan Perpu Cipta Kerja," *Jurnal USM Law Review* 6, no. 1 (2023): 320-31. <https://doi.org/10.26623/julr.v6i1.6307>

should be the focal point for upholding constitutional norms. However, Law Number 6 of 2023 accommodates the government and the DPR to maintain the substance of the Perppu that has ignored the spirit of formal improvement mandated in the MK Decision. This condition shows the potential for the phenomenon of constitutional disobedience, which could undermine the principle of constitutional supremacy if not accompanied by effective corrective mechanisms.

Legal certainty in the context of Law Number 13 of 2022 (Revision of the PPP Law) is also affected because Law Number 6 of 2023 becomes part of the legal framework governing the formation of legislation after the Constitutional Court Decision No. 91/PUU-XVIII/2020. Theoretically, the rules that should strengthen the parameters for forming constitution-compliant laws are overshadowed by the Perppu instrument, which has been re-legitimized by the legislature. This has implications for legislative practices that make the issuance of Perppu a shortcut in facing judicial corrections, thereby putting pressure on the fundamental norms of law formation that adhere to the principles of the 1945 Constitution, including those contained in Law Number 13 of 2022, to be re-contextualized in subsequent legislative practices. This analysis shows that legal certainty is not merely a matter of formal legality, but also constitutional consistency in the legislative process.¹⁴

d. Procedural Defects and Violations of the Principle of Openness

The inadequacy of the formation of the Job Creation Law becomes more apparent when viewed from a procedural aspect. The legislative process is considered to lack transparency and meaningful public participation. In the theory of deliberative democracy, public participation is not merely a formality, but an essential part of the legitimacy of laws. Laws that emerge without deliberative space to encompass public opinions or societal needs in the context of adequate regulation formation risk losing their democratic legitimacy among the public.¹⁵

The Constitutional Court in Decision Number 91/PUU-XVIII/2020 explicitly stated that the formation of the Job Creation Law contains procedural defects, particularly related to the principles of openness and public participation, and decided to rectify the procedural formation of the Job Creation Law within 2 years and declared that the Job Creation Law will remain in effect temporarily. This decision emphasizes that the legislative process that does not meet constitutional standards cannot be justified solely on the grounds of policy efficiency. From the perspective of the theory

¹⁴ Nabiyla Risfa Izzati, "Kepastian Hukum vs Ketidakpastian Kerja: Substansi Ketenagakerjaan Dalam Undang-Undang Nomor 6 Tahun 2023 Tentang Cipta Kerja," *Jurnal Hukum Ius Quia Iustum* 31, no. 2 (2024): 384–407. <https://doi.org/10.20885/iustum.vol31.iss2.art7>

¹⁵ Farid Hanif Tamimi et al., *Polemik UU Cipta Kerja 2020 Dan Otoritarianisme Demokratis: Telaah Ilmu Politik Dan Teori Habermas Pada Kasus UU Cipta Kerja*, n.d.

of constitutional supremacy, the ruling serves as a marker that the constitution functions as a controller against deviant legislative practices.

e. Comparison of Indonesia's Omnibus Law with other countries

The use of the omnibus law method in Indonesia has fundamentally different characteristics compared to the omnibus bill practice in the United States and Canada, especially when viewed from the perspective of constitutional theory and legal systems. These differences are not only technical but also involve normative legitimacy, institutional readiness, and the purpose of law-making. In Indonesia, the omnibus law is implemented thru the establishment of the Job Creation Law as an instrument for massive cross-sector deregulation with the primary aim of encouraging investment and economic growth. This method is used to amend and repeal hundreds of articles from dozens of laws that fall under different regulatory regimes. However, the implementation was carried out without any explicit regulation regarding omnibus law in the legislative formation system.

On the contrary, in the United States, the omnibus bill has developed as a relatively established legislative practice within the framework of the common law system and a flexible constitutional tradition. Although the United States Constitution does not explicitly regulate omnibus bills, the practice is accepted because it remains subject to strict constitutional procedures, such as approval by the two legislative chambers (House of Representatives and Senate) and the mechanism of presentment to the President. Thus, the legitimacy of omnibus bills in the United States does not rely on technical method regulations, but rather on adherence to constitutional procedures and effective checks and balances mechanisms. Criticism of the omnibus bill in the US is generally political or administrative in nature, not a fundamental constitutional issue.¹⁶

Meanwhile, Canada uses omnibus bills more sparingly and cautiously. In practice, omnibus bills in Canada usually remain within a cluster of policies that have substantial interconnections, such as criminal law reforms or specific fiscal policies. This approach reflects respect for the principles of legal systematics and clarity of norms. Moreover, the legislative process in Canada strongly emphasizes the role of parliament and committees, so the use of omnibus bills is not seen as a shortcut in legislation, but rather as a form of legal consolidation that remains in line with the principles of the rule of law.¹⁷

¹⁶ Moh imam Gusthomi, "Studi Kreatifitas: Perbandingan Konsep Sistem Omnibus Law Undang-Undang Cipta Kerja Di Indonesia Dan Konsep Sistem Omnibus Law Di Amerika," *Journal of Creative Attitudes Culture* 3, no. 2 (2022): 74–78. <https://www.journalofdiversity.com/index.php/jcac/article/view/71>

¹⁷ Alexandrio Adenfa, "Omnibus Law Di Indonesia: Perbandingan Hukum Kenegaraan," *Jurnal Hukum Adigama* 4, no. 2 (2021): 2019–41. <https://doi.org/10.24912/adigama.v4i2.17143>

The most crucial difference lies in the orientation of using the omnibus law. In Indonesia, the omnibus law is used as a strategic policy instrument for the broad and rapid restructuring of regulations, even at the cost of sacrificing the quality of the legislative process. In the United States and Canada, omnibus bills are more understood as pragmatic legislative techniques used in specific contexts and not intended to replace the entire normal legislative mechanism. In other words, omnibus bills in those two countries do not shift the paradigm of lawmaking, whereas in Indonesia, the omnibus law has the potential to create a new paradigm of legislation focused solely on efficiency.

f. sThe Tension between Regulatory Efficiency and the Rule of Law Principle

The imperfection in the formation of the Job Creation Law reflects the classic tension in constitutional theory, namely between governing efficiency and limited government. The government positions the Job Creation Law as an instrument for accelerating investment and economic growth. However, in a rule of law state, the objectives of a policy cannot justify means that contradict constitutional principles.

In the doctrine of the rule of law, regulatory efficiency must be placed as a secondary goal after legal certainty and democratic legitimacy. When efficiency is made the primary justification for ignoring constitutional legislative procedures, what happens is the degradation of the rule of law principle toward executive-driven legislation. This condition is dangerous because it opens a precedent for the formation of laws that increasingly move away from constitutional control.¹⁸

Overall, the shortcomings in the formation of the Job Creation Law do not only lie in the omnibus law technique but also in the failure to place that method within the framework of the constitution and the law on the formation of laws. This raises serious implications for legal certainty, democratic legitimacy, and the role of the Constitutional Court as the guardian of the constitution. In the long term, such legislative practices have the potential to weaken public trust in the law and state institutions.

2. The Imperfection of the Formation of the Job Creation Law from the Perspective of Constitutional Theory and Legal Politics

In modern constitutional theory, the President's authority to issue Government Regulations in Lieu of Law (Perppu) is a form of constitutional emergency power, which is an extraordinary power that may only be used in extraordinary circumstances. Article 22 paragraph (1) of the 1945 Constitution

¹⁸ Suryati Suryati et al., "Tinjauan Hukum Terhadap Omnibus Law Undang-Undang Cipta Kerja," *Simbur Cahaya*, 2021, 97–111. <https://doi.org/10.28946/sc.v28i2.902>

of the Republic of Indonesia explicitly stipulates that "In the event of an emergency situation, the President has the right to establish government regulations in lieu of laws," which doctrinally is interpreted as an exception to the normal principle of law-making based on deliberative democracy as regulated in Article 20 and Article 22A of the 1945 Constitution.

However, the constitution does not further elaborate on what is meant by urgent necessity, so the interpretation of this requirement becomes the task of the constitutional court and constitutional doctrine. The objective parameters regarding urgent necessity were only enriched by the Constitutional Court's decision in Decision No. 138/PUU-VII/2009, which established three objective conditions: 1. The urgent need to resolve legal issues quickly based on the law, 2. A legal vacuum that does not yet exist or is inadequate, 3. The inability of the ordinary legislative process to resolve the legal issue within the required time.

In constitutional law literature, this provision is viewed as an effort to ensure that the Perppu remains within the framework of limited government and constitutional supremacy, rather than being a policy convenience instrument used whenever the government faces legislative issues. The state of emergency theory explains that emergency powers are only legitimate if their primary function is to restore normalcy, not to serve as a regular legislative instrument.¹⁹

a. Theoretical Framework: Abusive Constitutionalism and Constitutional Hardball in Emergency Legislation

In the study of contemporary constitutional theory, the concept of Abusive Constitutionalism introduced by David Landau explains how constitutionally formal instruments can be used by political actors to substantially undermine the principles of constitutional supremacy and liberal democracy. Landau constructs this phenomenon as the use of constitutional mechanisms such as amendments, basic regulations, or legislative processes to maintain power and reduce the effectiveness of oversight institutions over executive and legislative authorities, even though these steps appear legal in form. In this context, the enacted constitutional policies can create a "measured decline in democracy," where legal instruments seemingly provide legitimacy, but in substance, they suppress constitutional control and the fundamental rights of society.²⁰

Integrated with that, Constitutional Hardball, a concept introduced by Mark Tushnet, underscores political practices where legislative or

¹⁹ AA Muhammad Insany Rachman et al., "Tinjauan Penetapan Perpu Nomor 2 Tahun 2022 Tentang Cipta Kerja Dalam Perspektif Sosiologi Hukum," *Jurnal Panah Keadilan* 2, no. 1 (2023): 41–51. <https://doi.org/10.22304/pjih.v11n3.a4>

²⁰ Fritz Edwadr Siregar, "Indonesia Constitutional Court Constitutional Interpretation Methodology (2003-2008)," *Constitutional Review* 1, no. 1 (2015): 1–27. <https://doi.org/10.31078/consrev111>

executive actors strategically exploit gaps in constitutional doctrine to achieve substantial long-term political goals, even tho it undermines established constitutional norms. Tushnet explains that such behavior, although within the formal boundaries of the rule of law, remains in the "gray area" that has the potential to shift the balance of power relations and the fundamental structure of governance without necessarily triggering direct legal rejection. This practice often emerges when politicians pursue fundamental changes to the legal and institutional structure of the state, often in situations where the outcome of political competition is perceived to be highly risky for their position of power.²¹

The correlation between these two theories and the phenomenon of emergency legislation is clearly seen in the use of the Job Creation Perppu, which was later enacted as Law No. 6 of 2023. Formally, the ratification of the Perppu falls within the corridor of Article 22 of the 1945 Constitution. However, from the perspective of abusive constitutionalism, this action can be viewed as the use of constitutional instruments to uphold the substance of a procedurally problematic law, despite being corrected by the Constitutional Court's Decision. This indicates the use of constitutional forms to achieve goals contrary to the fundamental purpose of constitutional protection, a core characteristic of abusive constitutional practices studied in contemporary constitutional law literature.

On the other hand, the expedited use of the Perppu thru legislative approval also reflects elements of constitutional hardball, where political actors employ aggressive legal tactics to maintain their legislative agenda without going thru the usual legislative process required by the Constitutional Court's ruling. Such practices, although formally legal, place significant pressure on deeper norms related to constitutional ethics and institutional stability. Thus, when political actors perceive that their victory or defeat in political contests implies significant changes to the legal system, they tend to adopt strategies that Tushnet refers to as constitutional hardball—requiring the strategic and aggressive use of constitutional procedures to ensure substantial dominance over the direction of the state's legal politics.

Thus, the theoretical framework that combines abusive constitutionalism and constitutional hardball is capable of providing sharper analytical tools to explain the phenomenon of emergency legislation such as the enactment of the Job Creation Law from a government regulation in lieu of law (Perppu). These two theories not only help in understanding the formal legitimacy of the actions of lawmakers but also reveal threats to the supremacy of the constitution thru the manipulation of legal instruments to achieve substantial political goals that

²¹ Mark Tushnet, "Constitutional Hardball," *Forthcoming, Cambridge Handbook of Constitutional Theory* (J. King & R. Bellamy Eds.), *Harvard Public Law Working Paper*, nos. 21–37 (2021).

can weaken judicial control and the principle of checks and balances in the constitutional system. This analysis reflects the urgency of contemporary constitutional studies regarding emergency legislation practices that are formally legal but can substantially distort fundamental constitutional principles.

b. Legal Politics of the Formation of the Job Creation Government Regulation in Lieu of Law Related to the Executive Legislative Strategy Post Constitutional Correction by the Constitutional Court

In the perspective of legal politics, the enactment of Government Regulation in Lieu of Law (Perppu) Number 2 of 2022 concerning Job Creation cannot be understood merely as a response to global economic conditions, but rather as a normative strategy to maintain the government's deregulation agenda following the Constitutional Court Decision Number 91/PUU-XVIII/2020. The decision explicitly ordered lawmakers to make improvements thru the ordinary legislative mechanism within a two-year period. However, the government's choice to issue a Government Regulation in Lieu of Law (Perppu) indicates a shift in the orientation of legal politics from fulfilling the Constitutional Court's ruling to securing the substance of strategic policies. Thus, the Job Creation Perppu reflects a legal political orientation aimed at stabilizing economic policy, rather than restoring the legislative process deemed unconstitutional by the Constitutional Court.

The legal politics of the Job Creation Law Perppu show a tension between judicial will and the political will of the executive-legislative. Theoretically, legal politics should function as the direction of law-making policies that align with the constitution and constitutional court rulings. However, in this case, legal politics are moving in a defensive logic, namely protecting the validity of the Job Creation Law regime from the consequences of unconstitutionality decided by the Constitutional Court. This indicates that the Perppu is used as a legal political instrument to avoid the risk of the cancelation of strategic legislative agendas, thus placing the Constitutional Court's decision not as the main normative guideline, but rather as an obstacle that must be politically managed.

The implication of the legal politics of the Job Creation Perppu on the state administration system is the shift in the relationship between branches of power, particularly between the executive and the judiciary. The Constitutional Court's decision, which should be the main reference for legislative improvement, is instead suppressed thru the legal-political instrument of a Government Regulation in Lieu of Law (Perppu). This condition has the potential to create a constitutional precedent, where every constitutional correction to strategic laws can be responded to not with procedural improvements as mandated by the Constitutional Court, but with emergency legislation that strengthens the executive's position. In the long term, such a pattern of legal politics can erode the function of the

Constitutional Court as the guardian of constitutional supremacy and transform the character of constitutional democracy to be more oriented toward the dominance of executive policy.²²

D. Conclusion

The formation of the Job Creation Law thru the omnibus law method and the issuance of the Job Creation Perppu indicate a deviation from the principles of a constitutional state of law, particularly the principle of due process of law in legislation, transparency, and meaningful public participation. The Constitutional Court's Decision Number 91/PUU-XVIII/2020, which declared the Job Creation Law conditionally unconstitutional, emphasized that procedural defects in law-making are serious constitutional violations. However, the government's response by issuing the Job Creation Perppu and enacting it into Law Number 6 of 2023 shows a tendency to maintain the substance of the policy thru emergency measures, rather than implementing the corrective order thru the ordinary legislative mechanism as mandated by the Constitutional Court. This condition marks a crisis of constitutional supremacy because the final and binding decision of the constitutional court is not substantially complied with.

In the perspective of contemporary constitutional theory, the practice of forming the Job Creation Government Regulation (Perppu Cipta Kerja) can be understood as a manifestation of abusive constitutionalism and constitutional hardball, which involves the use of constitutionally legitimate instruments to achieve legal-political goals that potentially undermine the principle of checks and balances. The legal politics of the formation of the Job Creation Perppu reflect a shift in orientation from the restoration of constitutional legislative procedures to the stabilization of economic policy thru a fast track. This has implications for the degradation of the Constitutional Court's function as the guardian of constitutional supremacy and potentially creates a dangerous constitutional precedent, as judicial corrections can be neutralized thru emergency legislation. Thus, the issues surrounding the Job Creation Law and the Job Creation Government Regulation in Lieu of Law are not merely technical legislative matters, but rather structural issues in the power relations and the quality of constitutional democracy in Indonesia.

E. Conflict of Interest Statement

The author declares that there is no conflict of interest regarding the publication of this article, and that the research and writing process were conducted

²² Suryati, S., Disurya, R., & Sardana, L. (2021). Tinjauan Hukum Terhadap Omnibus Law Undang-Undang Cipta Kerja. *Simbur Cahaya*, 97-111. <https://doi.org/10.28946/sc.v28i2.902>

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