

THE CONTROVERSY OF ENVIRONMENTAL LAW POLICIES FROM REGULATION PERSPECTIVE

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Abstract

Government Regulation in Lieu of Act No. 2 of 2022 was born as a result of obstacles in the investment sector, not due to the issue of climate change as contained in the Job Creation Government Regulation. The purpose of the research was to find out and analyze because the issuance of PERPPU Job Creation ignores the Constitutional Court Decision Number 91/PUU-XVIII/2020, which is related to Article 22 of the 1945 Constitution concerning the urgency which imposes benchmarks according to circumstances and is necessary to prevent a legal vacuum. The method used is normative research which studies legal norms and literature. Government Regulations in Lieu of Laws become the full authority of the President in accordance with the constitution and are regulated in Article 22 Paragraph 1 of the 1945 Constitution. In this Government Regulation in lieu of the Job Creation Law there are articles that have problems with the environment. The article will regulate issues of environmental permits, the role of the community in the AMDAL (Environmental Impact Analysis), use of forest areas and criminal sanctions.

Keywords: *Environment; Government; Job.*

A. INTRODUCTION

Although there had been various pros and cons from the community, in the end, the Job Creation Act No. 11 of 2020 was passed at the plenary session of the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) in October 2020. This Job Creation Law is known as the *Omnibus Law*, which aims to create jobs and increase foreign and domestic investment by reducing regulatory requirements for business license applications and land acquisition processes.¹ Omnibus Law seeks to harmonize several rules in various fields. Several fields received appreciation from various parties, but on the other hand, several fields also received criticism and rejection from the public.² To increase the prosperity of the people, development needs to be carried out in a planned manner because development activities are

1 Sudharto P. Hadi, Rizkiana S. Hamdani, Ali Roziqin., A Sustainability Review On The Indonesian Job Creation Law, *Heliyon*, Vol. 9, 2023

2 Feri Ardiansyah, Tantangan Pengawasan dan Penegakan Hukum Lingkungan Hidup dalam Implementasi Undang-Undang Cipta Kerja, Seminar Nasional, Semarang 2 December 2020, *Pembangunan Hijau Dan Perizinan: Diplomasi, Kesiapan Perangkat Dan Pola Standarisasi*, ISBN: 978-602-51396-6-6, Semarang, Sekolah Pascasarjana Universitas Diponegoro (UNDIP);

activities that change the environment.³ Article 4 of the Job Creation Law, there are ten scopes of regulation that are the target of regulatory arrangements, including (a) enhancing the investment ecosystem and business activities; (b) employment; (c) facilitation, protection, and empowerment of cooperatives and MSMEs; (d) ease of doing business; (e) research and innovation support; (f) land acquisition; (g) economic zones; (h) Central Government investment and acceleration of national strategic projects; (i) implementation of government administration; and (j) imposition of sanctions. In this field of environment amended laws related to the Law on Environmental Management (No. 32/2009), the Forestry Law (No. 41/1999), and the Law on the Prevention and Eradication of Forest Companies (No. 18/2013).

However, the Job Creation Law became problematic because the formulation method used the omnibus law, and it became even more complicated when the Constitutional Court issued decision Number 91/PUU-XVIII/2020.⁴ The Constitutional Court's decision gave rise to a complex discourse, both for the executive, legislative and judicial branches of power. This is because the content material in the Job Creation Law is not only related to structuring regulations in the executive sphere but also related to the imposition of sanctions, which will empirically be enforced by the judicial branch of power.⁵

On November 25, 2021, the Constitutional Court decided in its decision to order the legislators to make improvements within a maximum period of 2 (two) years from the pronouncement of this decision and if within this timeframe no corrections are made, then Act No. 11 Year 2020 concerning Job Creation is permanently unconstitutional, that is, as long as no amendments are made within 2 years after the decision is read, the law is automatically declared no longer valid. Therefore, on the pretext of compelling matters of interest, the Government carried out several maneuvers as an order from the quo decision, one of which was by using its veto right in Article 22 paragraph (1) of the 1945 Constitution which states that "In matters of urgency which force, the President has the right to stipulate government regulations in lieu of laws."

So, at the end of 2022, on December 30, 2022, to be exact, the Government issued Government Regulation in Lieu of Act No. 2 of 2022 concerning Job Creation (State Gazette of the Republic of Indonesia of 2022 Number 238, Supplement to State Gazette of the Republic of Indonesia Number 6841). The formation of a Government Regulation in lieu of Act No.

3 Agus Widodo, Mohammad Belayet Hossain, The Reconstructing Legal Policies of The Management and Control of Environmental Impacts for Industrial Areas in Urban of Central Java, *IJLR: International Journal of Law Reconstruction*, Vol. 6, No. 2, September 2022, page.241-256

4 Hasdinar, Implikasi Putusan Mk Nomor 91/Puuxviii/2020 Tentang Pengujian Undang-Undang Tentang Cipta Kerja Terhadap Pembentukan Peraturan Daerah, *Jurnal Legislatif*, Vol. 6, No. 1, December 2022

5 Dian Agung Wicaksono, *Quo Vadis* Pendirian Mahkamah Konstitusi Dalam Menguji Undang-Undang Cipta Kerja Dan Implikasinya Terhadap Kegamangan Pemerintah Daerah Dalam Melaksanakan Kewenangan Mengatur, *Jurnal RechtVinding*, Vol. 11, No. 1, April 2022;

2 of 2022 concerning Job Creation is in accordance with the Constitutional Court Decision Number 138/PUU VII/2009 regarding parameters as a crisis that compels the need to issue this PERPU, among others:⁶

1. Due to the urgent need to resolve legal issues expeditiously based on the Act;
2. The required law does not yet exist, resulting in a legal vacuum or the inadequacy of the existing law; and
3. The condition of the legal vacuum cannot be overcome by making laws in an ordinary procedure that requires quite a long time, while the urgent situation requires certainty to be resolved based on Ali Marwan's research about Compelling Circumstances of The Enactment Government Regulation in Lieu of Law.

The issuance of a Government Regulation in lieu of Act No. 2 of 2022 concerning Job Creation has become a debate among legal experts, which is still ongoing regardless of the Constitutional Court Decision Number 91, which relates to Article 22 of the 1945 Constitution regarding the urgency that forces benchmarks according to circumstances and needs to prevent vacancies law (*recht vacuum*), there is an element of a dangerous threat, related to policies and laws that must be considered and must be studied more deeply before regulations are enacted. Interestingly from the PERPPU Job Creation in the environmental field, where there is no substantial difference with the Job Creation Act No. 11 of 2020. It is as if the Government and Legislature want to save the Job Creation Law from the Constitutional Court Decision Number 91/PUU-XVIII/2020 by how to only replace the packaging of the Job Creation Law which was previously conditionally declared unconstitutional. PERPPU Job Creation is a legislative pragmatism regarding the chaotic Job Creation Law. The issuance of PERPPU Job Creation seems to be a highway for the government to respond to the government in the Constitutional Court decision Number 91/PUU-XVIII/2020.

Implementation of environmental approvals is a recommendation aimed at facilitating the issuance of permits in opening or building business activities. However, the aims and objectives contained in the Job Creation Law raise big question marks regarding the existence of permits and their relation to the environment. Opinions regarding the creation of a good balance between the environment and the economy by granting permits stipulated in the law and its derivative regulations need to be reviewed. From these problems, this research has the aim of identifying the problems taken, namely how to regulate environmental permits in business activities after the enactment of Act No. 11 of 2020 concerning Job Creation and its relationship with environmental management in Indonesia.

⁶ Ali Marwan Hsb, Kegentingan Yang Memaksa Dalam Pembentukan Peraturan Pemerintah Pengganti Undang-Undang (Compelling Circumstances of The Enactment Government Regulation In Lieu Of Law), *Jurnal Legislatif Indonesia*, Vol. 14, No. 1, March 2017, page.109 - 122

B. RESEARCH METHODS

This research is normative legal research which aims to describe the norms that apply in a particular legal system. This research is conducted according to the legal perspective of a particular legal system and the interpretation of legal norms.⁷ This method was chosen because the object of the research study is regarding legal principles, legal principles, and legal doctrine of jurists. To sharpen the analysis and several approaches to normative research that are used as supporting arguments, namely: *Conceptual Approach*.⁸ The legal materials used in this research are (a) primary legal materials which are binding in the form of laws and regulations and decisions of the Constitutional Court and (b) secondary legal materials in the form of literature, journal articles, and relevant research results. Data collection was carried out through a literature study on relevant legal materials.¹⁰ Analysis of the data that has been collected was carried out in a qualitative descriptive manner in order to answer the formulation of the problem in this study.⁹

C. RESULTS AND DISCUSSION

1. Study of "About Compelling Interests" in PERPPU Number 2 of 2022 concerning Job Creation

The issuance of PERPPU Number 2 of 2022 at the end of the year issued by the President became controversial considering that previously the Constitutional Court Decision had been issued which had conducted a formal review of the Job Creation Law and it was decided that the Job Creation Law was unconstitutional. PERPPU, which is 1117 pages thick, is controversial because it revokes Act No. 11 of 2020 concerning Job Creation so that it is no longer valid.

Jimly Asshiddiqie said that formal testing has a more serious impact than material testing. In the material review, the effect is only related to the material tested and approved, while in the formal review which questions the formation of the law, the effect results in the entire law being declared not binding for the public.¹⁰ It means that the Constitutional Court Decision Number 91/PUU-XVIII/2020, the discussion on Job Creation should be included back in the National Legislation Program for further discussion with a timeframe of 2 years for corrections to be made. If during the allotted time it is not corrected, then the Job Creation Law is deemed unconstitutional as a whole.

Government Regulations in Lieu of Laws are the full authority that

7 Davit Tan, *Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum*, *Nusantara: Jurnal Ilmu Hukum Pengetahuan Sosial*, e-ISSN:2550-0813|p-ISSN:2541-657X|Vol. 8, No. 8, Of 2021, page.2463-2478

8 Yati Nurhayati, Ifrani, M.Yasir Said, *Metodologi Normatif Dan Empiris Dalam Perspektif Ilmu Hukum*, *Jurnal Penegakan Hukum Indonesia (JPHI)*, Vol. 2, Issue. 1, February 2021, page.1-20

9 Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi*, Jakarta, Prenada Media Group, 2017, page. 237.

10 Jimly Asshiddiqie, *Pengujian Formil Undang-Undang di Negara Hukum*, Jakarta, Konstitusi Press, 2020, page.192.

can be issued by the President. And there is the phrase "compelling interests", which is a reason that must be met as a reason for issuing a PERPPU by the President. This decision concludes that matters of urgency are not the same as an emergency at the level of a civil emergency, military or state of war, but the urgency that compels is the subjective right of the President to determine it.

The issuance of PERPPU Number 2 of 2022 by Joko Widodo as the President of the Republic of Indonesia is considered to have met the parameters of urgent need and urgency to resolve legal issues quickly so that the President can use his authority to issue PERPPU as stipulated in Article 22 of the 1945 Constitution. More there are several reasons for the issuance of PERPPU Job Creation as outlined in the preamble considering PERPPU, which states that:

- a. In order to realize the goal of forming the Indonesian State Government and realizing a prosperous, just, and prosperous Indonesian society based on Pancasila and the 1945 Constitution, the State needs to make various efforts to fulfill citizens' rights to work and a decent living for humanity through job creation;
- b. By creating jobs, it is hoped that they will be able to absorb the widest possible Indonesian workforce in the midst of increasingly competitive competition and the demands of economic globalization, and the challenges and global economic crisis that can disrupt the national economy;
- c. To support job creation, it is necessary to adjust various regulatory aspects related to facilitating, protecting, and empowering cooperatives and micro, small, and medium enterprises, enhancing the investment ecosystem, and accelerating national strategic projects, including increasing the protection and welfare of workers;
- d. Regulations related to the facilitation, protection, and empowerment of cooperatives and micro, small and medium enterprises, improvement of the investment ecosystem, in accelerating national strategic projects, including increasing the protection and welfare of workers spread across various sectoral laws are currently unable to fulfill the legal need for the acceleration of work copyright so that changes need to be made;
- e. In an effort to change regulations relating to the facilitation, protection, and empowerment of cooperatives and micro, small, and medium enterprises, improving the investment ecosystem, and accelerating national strategic projects, including increasing the protection and welfare of workers, it is carried out through changes to sector laws that do not yet support the realization of synchronization in guaranteeing the acceleration of work creation, so that breakthroughs and legal certainty are needed to be able to resolve various problems in several laws into one law in a comprehensive manner using the omnibus method;
- f. In order to implement the Constitutional Court Decision Number 91/PUU-XVIII/2020, it is necessary to make improvements through

its replacement to Act No. 11 of 2000 concerning Job Creation;

- g. Global dynamics caused by rising energy and food prices, climate change, and supply chain disruptions have caused a decline in world economic growth and an increase in inflation which will have a significant impact on the national economy which must be responded to with the policy mix standards for increasing national competitiveness and attractiveness for investment through economic transformation contained in the Law on Job Creation

The scope of this Government Regulation in Lieu of Law on Job Creation includes:

- a. Improving the investment ecosystem and business activities;
Its function is to increase investment and business ecosystem by implementing risk-based business licensing, simplifying the main requirements for business licensing and simplifying sectoral business licensing as well as simplifying investment requirements. Business licensing requirements are now defined under the following categories:
 - b. Low Risk
Only requires a Business Identification Number
 - c. Medium Risk
Require Standard Certification other than NIB, which can further be classified into:
 - 1) Medium to low risk where the business owner's statement has met the requirements to carry out its business activities;
 - 2) Medium to high risk: issued by the Central or Regional Government based on verification of compliance with the requirements to carry out business activities.
 - d. High Risk
Require a Business License and Standard Certification, if applicable, to operate other than NIB.

Based on the Job Creation Law, all business fields are open for investment except for those that are closed for investment, or those that can only be carried out by the Central Government. This indicates a shift from the previous subjective approach which emphasized the subjects making investments, to an objective approach which focuses on business fields that are open for investment or not (regardless of domestic or foreign investment). However, it is still unclear how the government will further regulate restrictions on foreign investment after this Job Creation Law (i.e. whether there is still a negative investment list or not). This will become clearer after the Presidential Decree becomes available.

- a. Employment
Provide convenience to companies to recruit foreign workers. So that many experts from abroad can work in Indonesia. However, job competition will be more stringent. This makes opportunities for young Indonesians to compete strictly with foreign workers.

- b. Ease, protection, and empowerment of Cooperatives and MSMEs
Attention to MSMEs was developed in the Job Creation Law. MSMEs no longer have to have maximum net worth or annual sales results. MSME criteria can be in the form of incentives and disincentives, application of environmentally friendly technology and local content and the number of workers according to the criteria set in each business sector. In addition, provisions for ease of licensing for MSMEs are regulated in Article 91 of the Job Creation Law that MSME registration is carried out online by attaching a photocopy of an Identity Card (KTP) and a business certificate from the RT (Rukun Tetangga, lowest administrative unit). Then UMKM will get a Business Identification Number (NIB)
- c. ease of doing business
The Job Creation Law has expanded the definitions of Visa and Stay Permit to recognize electronic forms. As a result, Indonesian Visas and Stay Permits can now be issued physically or electronically by the relevant authorities. The Job Creation Law broadens the scope of various visas/permits by adding a list of eligibility and permitted activities. Foreigners can now obtain a Limited Stay Permit directly at the immigration checkpoint, eliminating the need to apply for a residence permit at the local immigration office in their country of origin. The Job Creation Law provides for the following additional exceptions to the requirement that foreigners must have a guarantor in Indonesia:
- 1) Foreigners investing in Indonesia.
 - 2) Foreigners whose country of origin imposes reciprocal exclusion on Indonesian citizens.
- d. Research and innovation support
For strategic job creation policies in Indonesia, most of them have properties that support and provide strength to the innovation ecosystem in Indonesia and also their implementation plans. The field of research on strategic job creation policies is a major concern which is one of the strategic job creation policies. Among them is the permanent use of sea space in the territorial waters and also the jurisdiction of the state. Catching fish and/or cultivating fish in the fishery management area of the Republic of Indonesia. Likewise in the exploration aspects of geothermal energy, electricity, motorized vehicle design and plantations and the development of micro and small businesses, as well as animal husbandry technology and health.
- e. Land acquisition
Some matters related to land acquisition for development and also public interest are:
- 1) Upstream and downstream oil and gas industrial zones controlled by the Central Government, Regional Governments, state-owned enterprises, or domestically-owned enterprises.

- 2) Special economic zones controlled by the Central Government, Regional Government, state-owned enterprises, or regionally-owned enterprises.
 - 3) Industrial estates controlled by the Central Government, Regional Governments, state-owned enterprises, or regionally-owned enterprises.
 - 4) Tourist areas controlled by the Central Government, Regional Governments, state-owned enterprises, or regionally-owned enterprises.
 - 5) Food security areas controlled by the Central Government, Regional Governments, state-owned enterprises, or regionally-owned enterprises.
 - 6) Field of technology development controlled by the Central Government, Regional Government, state-owned enterprises, or regionally-owned enterprises.
- f. Economic area
- The ease of permits for building a company or business provides a boost in the economic area through this Job Creation regulation. Apart from that, another advantage is the licensing of foreign workers which is very easy to get a work visa. The disadvantage gained by the community is the difficult employment opportunities where they have to compete with foreign workers. Meanwhile, business and company licensing no longer requires supervisors
- g. Central Government investment and acceleration of national strategic projects
- Government projects are getting easier with this regulation. Ease of foreign companies entering Indonesia and investing capital, as well as experts and foreign workers entering the work environment in Indonesia. This creates losses for private companies as well as the people of Indonesia because their land is getting narrower and competition is getting tougher
- h. Implementation of government administration
- One of the breakthroughs in the Government Administration Law is the so-called fictitious-positive provisions regulated in Article 53 of the Government Administration Law. With the provisions of Article 53 of the Government Administration Law referred to, people who request a decision can assume that their request has been granted 10 days after the complete request has been received by the official.
- The Job Creation Law shortened the waiting period from 10 days to 5 days before officials are deemed to have approved an application. Significant changes have also occurred marked by the removal of Article 53 paragraphs (4), (5) and (6) which regulate the authority of the TUN Court to render a decision on the acceptance of applications for requests that have not been responded to.

The changes in the Government Administration Law above are expected to support the creation of jobs and an investment climate that is profitable for businesses. However, it is necessary for a more in-depth study of whether these changes can increase the effectiveness of implementing government administration.

i. Imposition of sanctions

Previously, the Anti-Monopoly Law stipulated the imposition of a minimum fine of IDR 1 billion and a maximum of IDR 25 billion as sanctions for violations. And in the Job Creation Law, these sanctions are removed with the maximum amount of fines imposed. This abolition gives permission to KPPU to determine the maximum amount of fines without limitation for those who violate the Anti-Monopoly Law. However, this deletion occurred again through Government Regulation Number 44 of 2021 concerning Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition and Indonesian Competition Commission Regulation Number 2 of 2021 concerning Guidelines for the Final Imposition of Monopolistic Violations in Unfair Business Practices and Competition. This regulation states that sanctions will be imposed based on:

- 1) Maximum of 50% of each net profit generated by the company in the relevant market.
- 2) Maximum of 10% of the relevant total sales, and will be determined by considering:
 - a) Negative impact that caused by the violation.
 - b) Length of time the violation occurred.
 - c) Mitigating factors,
 - d) Aggravating factors, and/or
 - e) Company's ability to pay the fine in question.

2. Some Problematic Provisions in the Environmental Sector in PERPPU Number 2 of 2022

In the Job Creation PERPPU, there are several provisions of articles that are considered problematic in the environmental field, namely articles that regulate environmental licensing issues, the role of the community in Environmental Impact Analysis (*Analisis Mengenai Dampak Lingkungan Hidup*, AMDAL), use of forest areas, absolute responsibility, and concerning criminal sanctions. This section will explain several problematic provisions in the environmental field, including:

a. Environmental Licensing

PERPPU Number 2 of 2022 Article 21 states that in order to make it easier for everyone to get environmental approval, PERPPU can change, delete or stipulate new regulations. The term environmental licensing in Article 1 point 35 of the Law is changed to "Environmental Agreement". And in full reads "Environmental approval is a decision on environmental feasibility or a statement of

ability to manage the environment that has received approval from the central government or regional government."

b. Environmental Impact Analysis Document

Article 25 of Perpu Number 2 of 2022 states that the preparation of an Environmental Impact Analysis (AMDAL) only involves communities that are directly affected by activities or businesses. This article changes the provisions contained in Act No. 32 of 2009. In this article it is stated that apart from directly affected communities, environmental activists and environmental organizations can be involved in implementing AMDAL decisions.

Likewise in PERPU Number 2 of 2022 which abolishes the community's right to obtain transparent information regarding AMDAL documents. This is of course not in line with the spirit of democracy which is transparent and also participatory which places civil society as part of democracy. This regulation allows for corruption and collusion between business owners and affected communities. Meanwhile, environmental activists cannot do much when there are indications of EIA fraud in the activities or businesses being built.

c. Utilization of Forest Areas

PERPPU Number 2 of 2022 made several changes to the provisions on the Use of Forest Areas regulated in the Forestry Law (Number 41/1999), including:

1) PERPPU Number 2 of 2022 has ignored Article 18 which stipulates a minimum limit of 30 percent of forest area that must be maintained. a proportionate share of optimizing the environmental, social, and economic benefits of local communities is lost. In practice, it makes it easier for companies to use forest areas freely without any obligations.

2) PERPPU Number 2 of 2022 does not stipulate sanctions for forestry business actors who do not have permits and have been operating before this regulation came into force. This provision provides an opportunity for companies to continue operating without permission from the government.

d. Absolute Responsibility

The provisions on absolute responsibility in Article 88 of Act No. 32 of 2009 state "everyone whose actions, business and/or activities use Hazardous and Toxic Materials (B3), produce B3 waste, treat waste and/or pose a serious threat to the environment." absolutely responsible for losses that occur without the need to prove guilt.

In Article 88, the sentence "Without having to prove guilt" is omitted. This is also emphasized in Article 88 PERPPU Number 2 of 2022 which reads "Any person whose actions, business and/or activities use B3, produce B3 waste, process B3 waste and/or pose a serious threat to the environment, is absolutely responsible for losses arising from business and/or losses." This sentence is very important

because in absolute responsibility, every action that has a negative impact on the environment must be held accountable to the environment.

e. Provisions of Criminal Sanctions

The provisions on criminal sanctions in Act No. 32 of 2009 which include provisions for criminal witnesses with heavy sentences have been removed. The issue of environmental crimes in the form of acts of pollution and destruction of the environment which have so far been included in the extraordinary category has been ignored. For example, the provision of Article 103 of Act No. 32 of 2009 which regulates the management of hazardous and toxic materials (*Bahan Berbahaya dan Beracun*, B3) waste without a permit has been removed. This shows that the acts which are categorized as dangerous to the environment carried out by employers are ignored.

Changes in provisions related to environmental regulations in the Job Creation Law that need to be underlined are related to the mention of environmental permits which have been changed to become environmental agreements. However, this change in designation does not change the context of the substance of the environmental permit that was previously in the PPLH Law. Meanwhile, in terms of administrative sanctions, there is the addition of one new provision, namely related to administrative fines.

The imposition of administrative fines as a form of administrative sanctions, if examined closely, has the potential to become a polemic, because there is a dualism of reasoning and ambiguous interpretation between the arrangement of "fines" and "administrative fines". Polemics will arise when everyone debates the two arrangements with different reasoning. The presence of provisions for administrative fines as a new form of administrative sanction regulation has resulted in a significant change in the application of sanctions, considering that several violations that should have been regulated as criminal sanctions are now considered in the Job Creation Law as violations that are categorized as administrative sanctions, namely fines.

D. CONCLUSION

From this research, it can be concluded that the debate of legal experts is still ongoing because the issuance of PERPPU Job Creation ignores the Constitutional Court Decision Number 91/PUU-XVIII/2020, which is related to Article 22 of the 1945 Constitution concerning the urgency which forces benchmarks according to circumstances and needs to prevent legal vacuum or *Recht Vaccum*. There is a dangerous element of threat associated with policies and laws that must be studied before regulations are enacted. In PERPPU Job Creation there are several problematic article provisions in the environmental field which are still being debated. These regulations are more detrimental to society, especially in the environmental sector.

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